

Law Commission

Consultation Paper No 228

PLANNING LAW IN WALES

Scoping Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Bean, *Chairman*, Professor Nick Hopkins, Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Phil Golding.

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

- considers the case for simplifying and consolidating planning legislation in Wales, with the eventual aim of producing a Planning Code for Wales;
- proposes technical adjustments to produce a satisfactory consolidated text – for example, correcting errors, removing ambiguities and obsolete material, modernising language and resolving a variety of minor inconsistencies;
- proposes simplification of the law by streamlining and rationalising unnecessary process and procedure; and
- considers the writing into statute of propositions of law developed in case law where they might contribute towards more accessible and coherent legislation.

Geographical scope: This consultation paper applies to the law of Wales.

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

Comments may be sent:

By email to Planning_wales@lawcommission.gsi.gov.uk

OR

By post to David Connolly, Public Law Team, Law Commission of England & Wales,
1st Floor Tower, 52 Queen Anne's Gate, London, SW1H 9AG.

Tel: 020 3334 3968

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

Duration of the consultation: We invite responses from 30 June to 30 September 2016.

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

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at: <https://www.gov.uk/government/publications/consultation-principles-guidance>.

Information provided to the Law Commission: We may publish or disclose information you provide us in response to this consultation, including personal information. For example, we may publish an extract of your response in Law Commission publications, or publish the response in its entirety. We may also be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. If you want information that you provide to be treated as confidential please contact us first, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic disclaimer generated by your IT system will not be regarded as binding on the Law Commission. The Law Commission will process your personal data in accordance with the Data Protection Act 1998.

THE LAW COMMISSION
PLANNING LAW IN WALES
SCOPING PAPER
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CHAPTER 1

INTRODUCTION

BACKGROUND

- 1.1 The Law Commission agreed to conduct a project on planning law in Wales as part of our 12th Programme of Law Reform, its terms of reference being to review the law relating to town and country planning in Wales and make recommendations to simplify and modernise the law.¹
- 1.2 To inform the project, the Law Commission undertook a critical examination of the way in which the development management process operates in law and practice. We looked closely at the primary legislation governing this area, and spoke with a range of groups and individuals with particular expertise or interests. This was not intended to be a comprehensive consultation exercise, but rather an attempt to ascertain the nature and range of concerns about the law and its practical application. Some of the groups or individuals had been involved in advising on, or contributing towards, the Planning (Wales) Act 2015 (“PWA 2015”), and some are involved with ongoing matters of planning law reform.
- 1.3 Whilst we considered there could be benefits from a range of possible changes to the operation of the system, we did not conclude that there was a need for further fundamental reform in this area. What became increasingly apparent during the course of our review was, however, the need for a broader simplification of the law. In particular, our review highlighted that in places it is difficult to find out what the law is, that some areas are unnecessarily complex and that the form of the law is becoming progressively less accessible.
- 1.4 In summary, planning law in Wales suffers, first of all, from the problem of fragmentation that it shares with the law in England. The planning law of England and Wales was last consolidated in 1990, in the Town and Country Planning Act 1990 and two other statutes dealing with listed buildings and conservation areas² and with hazardous substances.³ The 1990 legislation has been described as a “remarkable achievement”,⁴ but the clarity of presentation achieved by it did not last long. Further legislation devoted in whole or in part to planning was passed in each year from 1991 to 1995. Since 2000 there have been a further six Acts of Parliament and four Acts of the Assembly. Much of the subsequent legislation, including the Planning (Wales) Act 2015, takes effect by amending the Town and Country Planning Act 1990, but in some cases it makes separate new provision – in particular in the Planning Act 2008, which introduced a national system of approval for “nationally significant infrastructure projects”. It is impossible to navigate the law without an updated text. It is often not clearly stated whether

¹ Twelfth Programme of Reform (2014) Law Com No 354

² Planning (Listed Buildings and Conservation Areas) Act 1990

³ Planning (Hazardous Substances) Act 1990

⁴ *Hansard* (HC), 14 May 1990, vol 172, col 714 (Mr John Fraser MP).

provisions in Acts of Parliament apply to Wales.⁵

- 1.5 As a consequence of our preliminary work, it was agreed with Welsh Government that the project provided an opportunity to address the need for consolidation and simplification of the existing law. An exercise of this kind is particularly appropriate following the reforms of planning law in Wales introduced by the PWA 2015, and the consequent increasing divergence between the laws in England and Wales.
- 1.6 This is an exciting opportunity to innovate by undertaking a task which has the core aim of clearer, simpler and more accessible law. If this can be achieved, it could be very significant for the effective operation, and democratic legitimacy, of the planning system in Wales.
- 1.7 This project coincides with our project on the Form and Accessibility of the Law Applicable in Wales, in which we are publishing a report (“Form and Accessibility Report”)⁶ contemporaneously with the present paper. In that report we recommend a new approach to legislation by the National Assembly, whose hallmarks are:
 - (1) that the existing fragmented bodies of legislation applying in relation to Wales in respect of particular subject-matter be restated in one piece of Assembly legislation (a process often called “consolidation” of legislation);
 - (2) that, in tandem with the process of consolidation, the opportunity is taken to introduce reforms with a view to improving the functioning of the legislation; and
 - (3) that the resulting text should stand as a code, its integrity protected by a discipline that further legislation in its subject area should be incorporated into it.
- 1.8 In the Form and Accessibility Report we use the terms “codification” and “codes” to describe this process and its outcome.
- 1.9 Given the extent of policy-driven reforms already effected by the PWA 2015, we envisage that reform will be limited to what we refer to as “technical reform” or “simplification”. We provisionally consider that the consolidation and simplification of planning legislation for Wales should include:
 - (1) the restatement of existing law so that as far as reasonably practicable it is contained within a single piece of legislation in a modern, consistent and well-ordered manner so as to be easily accessible to its readers;
 - (2) adjustments to produce a satisfactory consolidated text of the sort traditionally made in the course of consolidation – correcting errors,

⁵ For example, Pt 2 of the Planning and Compulsory Purchase Act 2004 does not apply in Wales; this is not stated expressly, but is achieved by s 37 of the Act (the interpretation section applying to Pt 2) employing a definition of “local planning authority” that does not include any local authorities in Wales.

⁶ Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366.

removing ambiguities and obsolete material, modernising language and resolving a variety of minor inconsistencies;

- (3) the simplification of the law by way of streamlining and rationalising unnecessary process and procedure, but not introducing any substantial change of policy; and
- (4) the writing into statute of propositions of law developed in case law where they might contribute towards more accessible and coherent legislation; we describe this as “codification of case law”, to distinguish it from codification in the wider sense described above.

1.10 We see this process as the first stage in the eventual production of a comprehensive Planning Code for Wales.

PURPOSE OF THIS PAPER

1.11 There are currently approximately 48 substantial pieces of primary legislation which regulate development and the use of land in Wales.⁷ Included within these are Acts which deal in part with planning topics, Acts which deal with topics that are distantly related to planning, and Acts which contain provisions which relate to planning matters that are now arguably redundant.

1.12 With such a mass of legislation to deal with, our first task is to set realistic parameters on the immediate exercise to ensure the task does not become unmanageable. In a world where resources are necessarily limited, and where technical law reform can find itself competing for legislative time with a Government’s immediate policy objectives, we must carefully balance the cost of the exercise against the benefit that it will deliver to the people of Wales.

1.13 Our project is, inevitably, only the first stage in the progress towards a Planning Code for Wales. As we discuss further in Chapter 4, the sheer scale of the legislation which will need to be considered as part of a comprehensive codification of the law on development planning in Wales makes it inevitable that this project will deal with only part of the whole body of legislation. It will be essential therefore to consider a broader scheme of legislative reform as part of the process of defining the scope of a new Planning Code.

1.14 With this paper we are seeking to:

- (1) consider the key statutes regulating the development and use of land and examine how this framework might be improved;
- (2) identify the area of focus for our work;
- (3) establish the scope of an initial piece of legislation (in other words, to decide which topics should be included and, equally importantly, excluded);
- (4) establish the need for and extent of the technical reform which will be required in order to produce a better piece of legislation; and

⁷ See para 4.3 below.

- (5) seek the views of stakeholders on issues of scope and technical reform in preparation for further work in these areas in the substantive phase of the project.

PROJECT STRUCTURE

- 1.15 This project is structured in three phases, with a review point at the conclusion of the first and second stages. The review points allow the Law Commission and the Welsh Government to review the progress of the project.
- 1.16 The first stage concerns the scope of the project. This scoping paper sets out our current thinking but its publication is also designed to give stakeholders an opportunity to comment on our provisional views. In this way, we will establish that the project is manageable in its ambitions and likely to result in a product which has substantial public benefit.
- 1.17 The second stage will involve the formulation of our substantive proposals as to the shape and content of an initial piece of consolidated and simplified legislation. We will publish a consultation paper, undertake public consultation and report on our conclusions as to the formulation of that piece of legislation.
- 1.18 There will then be a further review at which we hope to establish with the Welsh Government a process for the production of a draft Bill or Bills to implement our conclusions.

IMPACT ASSESSMENT

- 1.19 The Law Commission produces impact assessments of its reform projects. While this project does not deal with policy-driven reform, it does still seek to make technical reform proposals which rationalise the substance of the law and improve process and procedure. We shall undertake an initial consideration of the impact of technical reform in the substantive phase of the project and publish an impact assessment alongside our consultation paper.
- 1.20 The impact assessment will identify both monetised and non-monetised impacts of reform, with the aim of understanding the overall impact on society and the wider environment.
- 1.21 Impact assessments place a strong emphasis on valuing costs and benefits in monetary terms. However, there are important aspects of the present law, and of our proposed reforms, that cannot sensibly be monetised. These may include the positive impacts on the planning system, fairness and public participation, public confidence and understanding, and follow-on benefits from freed up resources.
- 1.22 Ultimately, the impact assessment process requires that we make an assessment of the quantifiable costs and benefits. In our view, a new Planning Code offers considerable potential benefit, for example:
 - (1) improvements in the ability of users to access and interpret the law;
 - (2) efficiency gains in terms of time savings to local planning authorities (“LPAs”), businesses and individuals;
 - (3) reduced professional costs (legal and consultancy fees) incurred by

applicants;

- (4) reduced numbers of enquiries from prospective applicants to the LPA for clarification of the law;
 - (5) improvements in terms of community participation in the planning process by producing a clearer and more accessible piece of legislation; and
 - (6) wider benefits to the economy and society if development is less likely to be subject to delays.
- 1.23 The exercise of preparing a new Planning Code will, however, inevitably involve costs, such as: time spent by legislative counsel to research and draft a new Bill; time spent by lawyers and government officials supporting legislative counsel, preparing guidance and informing LPAs, industry and the public of new legislation; the Assembly's time to consider a new bill; and the time taken by users to understand and apply any changes, including any training that may be required.
- 1.24 While we shall be seeking in the substantive phase of this project to assess fully the costs which are attributable to the defective state of existing legislation, it is our preliminary view that the potential benefits which are likely to arise from undertaking this exercise will be of substantial value to users of the planning system, and outweigh the costs outlined above.
- 1.25 Consultation question 1-1: We ask stakeholders to provide us with any available figures, estimates or experience of both monetised and non-monetised costs caused by over-complicated or otherwise defective planning legislation.**
- 1.26 Consultation question 1-2: We ask stakeholders to provide us with examples of benefits that could be gained from consolidation and simplification of planning legislation.**

OUTLINE OF THE SCOPING PAPER

- 1.27 This scoping paper is structured as follows:
- (1) Chapter 2 describes the legislative context of the project;
 - (2) Chapter 3 sets out the case for codification of planning law in Wales;
 - (3) Chapter 4 defines the scope of the proposed initial piece of codified legislation. We identify the area of focus for the project in the context of a wider programme of consolidation, and then seek to identify the topics which might usefully be codified in the initial phase;
 - (4) Chapter 5 considers how the substance of the law might better meet modern needs through rationalisation or simplification of process and procedures;
 - (5) Chapter 6 looks at simplifying the law through the drawing together of separate statutory consent regimes, which include listed buildings,

conservation area consent and consent under the advertisement regulations; and

- (6) Chapter 7 considers the merits of codifying case law in order to contribute towards a formulation of the law which is more accessible and comprehensive.

1.28 Questions relevant to the scope of the project are asked at the end of a number of chapters. While we specifically seek stakeholders' views on these particular questions, we also welcome comments and suggestions as to the scope of the project generally and key issues which may arise.

1.29 Our formal consultation period will run from 30 June 2016 to 30 September 2016. During this time we will welcome written responses from all interested parties and will seek to meet as many key stakeholders as we can to discuss the issues raised in this paper. Details of how to respond can be found on the inside front page of this paper.

CHAPTER 2

THE WIDER CONTEXT OF THE PROJECT

INTRODUCTION

- 2.1 This chapter sets out the historical development of Welsh planning law in view of the devolved competence to legislate on town and country planning. It will then consider the evolution of the principal pieces of planning legislation for Wales.
- 2.2 The final part will describe the legal framework within which a new Planning Code would fit. It will outline the relationship between planning law in Wales, European Union law and the series of interconnected Acts recently passed by the National Assembly for Wales.

THE DEVELOPMENT OF WELSH PLANNING LAW

Devolution of planning matters and issues of legislative competence

- 2.3 A distinctive approach to Welsh planning law began in the 1990s, several years after the administrative devolution of planning functions to the Welsh Office.¹ The first differences were seen with changes to the development plan system. In Wales, the development plan system had historically mirrored that in England; however, in 1996, local government reorganisation created unitary councils. As a result, the development plan system in Wales was reconfigured to require authorities to prepare unitary development plans.
- 2.4 In May 1996, the Wales Office consolidated planning policy with the creation of Planning Guidance Wales. Moreover, the Welsh Office produced two distinctive planning policy statements, known as Planning Policy Guidance (PPG), on “Unitary Development Plans in Wales” and “Planning Guidance Wales”. Thus, by the eve of devolution, Wales had a planning system that looked nationally distinctive and provided a platform for Wales to develop its own planning policies.
- 2.5 The Government of Wales Act 1998 (“GoWA 1998”) established the National Assembly for Wales. The legislative powers of the National Assembly were restricted to the making of secondary legislation in the devolved fields of competence, of which town and country planning was one.
- 2.6 The Government of Wales Act 2006 (“GoWA 2006”) separated the executive and legislative functions of the National Assembly, creating the Welsh Assembly Government (as it was then called). Part 4 of the GoWA 2006, which came into force following a national referendum in 2011, gave the National Assembly primary legislative powers in 20 subjects areas, including:

2 Ancient monuments and historic buildings

... Buildings and places of historical interest

6 Environment

¹ H Williams and M Jarman, “Planning policies and development plans in Wales – change and coexistence” [2007] *Journal of Planning Law* 985.

... Environmental protection, including pollution, nuisances and hazardous substances ... Nature conservation.

18 Town and country planning

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

- 2.7 An exception to the town and country planning competence in subject 18 was added for development consent under the Planning Act 2008 (“PA 2008”).²
- 2.8 Despite there being seemingly broad powers devolved in respect of town and country planning, there are still issues of legislative competence in relation to planning matters in Wales. In particular, there is an exception for “development consent” under the PA 2008.³ The Wales Bill introduced into the House of Commons on 6 June 2016 reserves aspects of planning law, including the subject-matter of Parts 2 to 8 of the PA 2008, but only in relation to nationally significant infrastructure projects, certain overhead electric lines and railways.⁴
- 2.9 The PA 2008 provisions are, however, relatively easy to isolate as they stand alone in a separate piece of legislation. However, complications for this project may arise with provisions in the Town and Country Planning Act 1990 (“TCPA 1990”). In particular, we are aware of issues of legislative competence in relation to blight provisions. Chapter 2 of the TCPA 1990 concerns land blighted by development proposals under a variety of Acts.⁵ It applies where land is affected by National Policy Statements and Development Consent Orders under the PA 2008. The law on land in Wales blighted by Development Consent Orders may have to be left in the TCPA 1990.
- 2.10 The Wales Bill also contains a reservation of the compulsory purchase of land.⁶ We shall keep the progress of the Bill under review during the course of this project.

Town and Country Planning Act and subsequent amending legislation

- 2.11 The Town and Country Planning Act 1990 is currently the principal planning Act in both England and Wales, containing the core provisions on control over development and enforcement in respect of a breach of planning control.
- 2.12 The TCPA 1990, alongside the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Planning (Hazardous Substances) Act 1990, comprises

² Localism Act 2011, s 131.

³ GoWA 2006, sch 7, pt 1. For an explanation of the Development Consent Order process, see paras 2.16 and 2.17 below.

⁴ Sch 1 para 183.

⁵ Planning blight occurs where proposals contained in a development plan prevent the owner of land or property from selling his interest in the open market because of the threat of a compulsory purchase notice by a LPA or other statutory agency. See J C Blackhall, *Planning Law and Practice* (3rd edn 2005) p 371; TCPA 1990, sch 13.

⁶ Wales Bill, sch 1, para 185.

the third consolidation of planning legislation since the introduction of the present system of planning control by the Town and Country Planning Act 1947.⁷

- 2.13 The changes introduced by subsequent Acts have been made predominantly by inserting provisions into, and making amendments to provisions in, the TCPA 1990. Part 6 of the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”) introduced a new, stand-alone system of development plans for Wales, providing a statutory footing for the Wales Spatial Plan and local development plans (“LDPs”).
- 2.14 The PA 2008 – applying to both England and Wales – introduced a unified development consent procedure for nationally significant infrastructure projects (“NSIPs”). The changes were aimed to “fast track” the consenting process for major infrastructure schemes such as airports, power stations and transport systems. The Development Consent Order (“DCO”) procedure introduced by the Act provides an element of streamlining; however, this is more by way of bypassing elements of the existing system rather than by simplifying it.
- 2.15 The application of the PA 2008 is different in England and Wales, with particular issues arising in the determination of consents linked to the NSIP. NSIPs usually require “associated development” – development that, though not strictly integral to the project, is necessary for its operation eg support infrastructure. In Wales (unlike England), consent for associated development is determined by the local planning authority (“LPA”) rather than through the national DCO process.⁸
- 2.16 Matters ancillary to the NSIP (eg compulsory acquisition or stopping up or diversion of highways) are determined by the normal consenting authority – which could be the LPA, the Welsh Ministers, Natural Resources Wales or another body.⁹ However, the PA 2008 allowed for certain ancillary consents to be determined by the UK Government if the normal consenting body agrees to its inclusion in the DCO.¹⁰
- 2.17 This means that “associated development” and “ancillary consents” relating to NSIPs in Wales are generally made at different times and decided by different bodies from the one responsible for the main project, creating delay and uncertainty. The effects are, to some extent, mitigated by the Planning (Wales) Act 2015¹¹ and proposals in the Wales Bill.¹²
- 2.18 The PA 2008 included a number of provisions, applying to England and Wales, introducing changes to the development management system – some of which

⁷ The Planning (Consequential Provisions) Act 1990 was part of this consolidation exercise, but this Act does not have any stand-alone substantive content.

⁸ Planning Act 2008, s 115.

⁹ Planning Act 2008, sch 5, pt 1.

¹⁰ Planning Act 2008, ss 120(2) and (3).

¹¹ The Planning (Wales) Act 2015 allows the Welsh Ministers to determine developments of national significance below the current NSIP thresholds. See Planning (Wales) Act 2015, pt 5.

¹² The Wales Bill contains provisions which would enable associated consent for certain energy-related infrastructure schemes to be considered alongside the main project. See Wales Bill, cl 39.

have been commenced in Wales,¹³ and others which have not.¹⁴ In the substantive phase of the project we will consider whether to bring forward the uncommenced provisions as part of the proposed Planning Code. Further changes have been made by the Local Democracy, Economic Development and Construction Act 2009, the Localism Act 2011, the Growth and Infrastructure Act 2013, the Enterprise and Regulatory Reform Act 2013 and the Infrastructure Act 2015; however, the majority of these provisions do not apply to Wales.

- 2.19 Recently, the Planning (Wales) Act 2015 (“PWA 2015”) made amendments to the TCPA 1990 and PCPA 2004. Part 2 of the PWA 2015 requires that public bodies must exercise their functions relating to development plans and applications for planning permission in such a way as to promote sustainable development. Part 3 provides a legislative basis for the introduction of a National Development Framework, replacing the Wales Spatial Plan. It also makes provision for the designation of strategic planning areas, the establishment of strategic planning panels and the preparation of strategic development plans. Amending Part 6 of the PCPA 2004, the PWA 2015 introduces a new hierarchy of plans: a National Development Framework; strategic development plans (“SDPs”); and LDPs. LDPs and SDPs must be “in general conformity” with the Framework.
- 2.20 Part 5 of the PWA 2015 revises the application procedure for “developments of national significance”, requiring applications to be made directly to Welsh Ministers rather than local planning authorities (“LPAs”). Part 6 makes amendments to various areas of development management; for example, making provision for appeals where an LPA gives notice that an application is invalid, and introducing a requirement for LPAs to consider Welsh language when determining applications. Part 7 establishes a new appeals process and introduces additional enforcement powers, enabling LPAs to issue enforcement warning notices and decline retrospective applications for development subject to enforcement.
- 2.21 The Historic Environment (Wales) Act 2016 (“HEWA 2016”) inserts further Wales-only provisions into the Planning (Listed Buildings and Conservation Areas) Act 1990 to give more effective protection to listed buildings and scheduled monuments. The Act amends the consent procedure for permitted works to listed buildings and creates new measures that, among other things:
- (1) allow Welsh Ministers to put an immediate halt to unauthorised works to scheduled monuments and make it easier for action to be taken against those who have damaged or destroyed monuments;
 - (2) enable authorities to act quickly if a listed building is under threat from unauthorised works and give them greater flexibility in dealing with historic buildings that require urgent works to protect them from further decay;
 - (3) make it easier for owners or developers to create sustainable new uses for unlisted historic buildings by relaxing the conditions for applications

¹³ For example, compensation where planning permission granted by a development order or local development order is withdrawn (PA 2008, s 189).

¹⁴ For example, fees for appeals (PA 2008, s 200).

for certificates of immunity from listing; and

- (4) allow owners of historic assets to negotiate partnership agreements with consenting authorities for a period of years, eliminating the need for repeated consent applications for similar works and encouraging more consistent and coherent management of the buildings or monuments.

2.22 The amendments to the Listed Buildings Act 1990 introduced by the HEWA 2016 are in some respects similar to those introduced in England by the Enterprise and Regulatory Reform Act 2013, but they are by no means identical.

LEGISLATIVE CONTEXT OF THE WELSH PLANNING SYSTEM

Interconnected legislation introduced by the Welsh Government

2.23 Aligned with the objective of securing the sustainable development of Wales, the Welsh Government introduced two pieces of legislation alongside the PWA 2015: the Well-being of Future Generations (Wales) Act 2015¹⁵ and Environment (Wales) Act 2016.¹⁶ The principle that connects the three interlinked pieces of legislation is a commitment to sustainable development to improve the well-being of Wales now and for future generations.

2.24 The Well-being of Future Generations (Wales) Act 2015 has three key purposes:¹⁷

- (1) to set a framework within which specified Welsh public authorities will seek to ensure the needs of the present are met without compromising the ability of future generations to meet their own needs (the sustainable development principle);
- (2) to put into place well-being goals which those authorities are to seek to achieve in order to improve well-being both now and in the future; and
- (3) to set out how those authorities are to show they are working towards the well-being goals.

2.25 The Act provides for a “well-being duty” which requires public bodies to carry out sustainable development by publishing objectives and taking all reasonable steps to meet those objectives.¹⁸ To achieve these ends, the Act establishes a Future Generations Commissioner for Wales to assist public bodies to make more sustainable choices and safeguard the interests of future generations. In the planning context, LPAs are required to take the well-being duty into account in the preparation of plans and determination of applications. Accordingly, the PWA 2015 contains a statutory purpose for planning functions that confirms and clarifies the requirement to carry out sustainable development under the Well-being of Future Generations Act 2015 and complements the aims and objectives

¹⁵ Received royal assent on 29 April 2015.

¹⁶ Received royal assent on 24 March 2016.

¹⁷ National Assembly for Wales, “Well-being of Future Generations (Wales) Act 2015” <http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?lId=10103> (last visited 24 June 2016).

¹⁸ Well-being of Future Generations (Wales) Act 2015, s 3.

of that Act.

- 2.26 The Environment (Wales) Act 2016 is designed to manage Wales' natural resources in a more proactive and sustainable manner. The Act introduces a duty requiring all public authorities to seek to "maintain and enhance biodiversity" where it is within the proper exercise of their functions and, in doing so, "promote the resilience of ecosystems". The Act recognises that the resilience of ecosystems is essential to the well-being of Wales, complementing the legislative framework within the Well-being of Future Generations (Wales) Act 2015. It similarly aligns with the aims of the PWA 2015 in supporting sustainable development by ensuring that evidence in relation to key risks and opportunities associated with the management of Wales' natural resources informs the planning process through local well-being assessments.

EUROPEAN LAW AND POLICY

- 2.27 Although planning is not an EU competence, EU legislation and case law currently have a direct impact on Welsh planning law. In particular, the Environmental Impact Assessment Directive,¹⁹ Strategic Environmental Assessment Directive,²⁰ the Habitats Directive²¹ and the Birds Directive²² ensure that the planning system maintains an appropriate level of environmental protection. The directives are incorporated in free-standing regulations that set out the procedural duties of LPAs, Welsh Ministers and developers and are to be read in conjunction with, or specifically amend, planning legislation. A development plan or decision on an application for planning permission may be invalid if the processes contained in the EU directives are not complied with.²³
- 2.28 We note the result of the referendum on the UK's membership of the EU on 23 June 2016. The effect of EU legislation and policy on planning law in Wales will be affected over the course of this project, and we will accordingly take heed of those changes. For current purposes, however, we describe the content and effect of European legislation currently in place.

Environmental impact assessment

- 2.29 An environmental impact assessment ("EIA") aims to prevent, reduce or offset the significant adverse environmental effects of proposed development. The process ensures that planning decisions are taken in view of the environmental effects of the project and with engagement from statutory bodies, local and national groups and the public.

¹⁹ Environmental Impact Assessment Directive 85/337/EEC, Official Journal L 175 of 5.7.1985 p 40.

²⁰ Strategic Environmental Assessment Directive 2001/42/EC, Official Journal L 197 of 21.7.2001 p 30.

²¹ Habitats Directive 92/43/EC, Official Journal L 206 of 22.7.1992 p 7.

²² Birds Directive 2009/147/EC, Official Journal L 20 of 26.1.2010 p 7 (the codified version of Birds Directive 79/209/EC, Official Journal L 103 of 25.4.1979 p 1 as amended).

²³ See *R (Champion) v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710. The Supreme Court held that a court is not required to quash a decision granting planning permission where the requirements of the EIA or Habitats Directive are not complied with. A court can take the view that the decision would not have been different without the procedural defect invoked by the applicant.

- 2.30 Directive 85/337/EC on the assessment of the effect of certain public and private projects on the environment (“Environmental Impact Assessment” or “EIA” Directive) requires an EIA for certain major developments. The Directive has since been amended three times: Directive 97/11/EC extended the range of developments subject to EIA and changed aspects of the EIA procedure; Directive 2003/35/EC aligned the provisions on public participation with the second pillar of the Aarhus Convention; and Directive 2009/31 added projects relating to transport, storage and capture of carbon dioxide to the classes of project subject to an assessment under annex I and II. The EIA Directive and its subsequent amendments have been codified by Directive 2011/92/EC, which was then amended in 2014.
- 2.31 The EIA Directive was implemented by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (“1999 Regulations”).²⁴ These have been replaced in England by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011,²⁵ and in Wales by the Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2016 (“2016 Regulations”).²⁶ The Welsh Government issued Circular 11/99 giving guidance on the EIA procedure.
- 2.32 The 2016 Regulations integrate EIA procedures into the existing framework of LPA development management, providing a systematic method of assessing the environmental implications of, and consulting on, developments that are likely to have significant effects. A developer applying for planning permission for a schedule 1 or 2 development must submit an environmental statement containing the information required to assess the environmental effects of the development. The applicant must submit additional copies of the application accompanied by an environmental statement for Welsh Ministers and consultation bodies and, on receipt, the LPA must take steps to publicise the application. The LPA then has 16 weeks from receipt of the environmental statement, as opposed to the usual 8 weeks, in which to determine the application. Regulation 3 prohibits an LPA or Welsh Ministers from granting planning permission to an EIA development unless they have taken the environmental information into account and stated in their decision that they have done so.

Strategic environmental assessment

- 2.33 In addition to the EIA Directive, Directive 2001/42/EC on the environmental assessment of plans and programmes (“Strategic Environmental Assessment Directive” or “SEA Directive”) intends to integrate environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development. The rationale behind the SEA Directive is that while major projects likely to have an impact on the environment must be assessed under the EIA Directive, the assessment takes place when the options for significant change are limited. Strategic Environmental Assessment (“SEA”) “plugs the gap” by requiring a broad range of plans and programmes to be assessed, so that they can be taken into account when plans are being prepared and accepted.

²⁴ SI 1999 No 293.

²⁵ SI 2011 No 1824.

²⁶ SI 2016 No 58.

2.34 The Directive has been brought into effect by the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 (“2004 Regulations”), as incorporated in sections 19 and 38 of the Planning and Compulsory Purchase Act 2004. The LPA, when preparing a local development plan, must also prepare a sustainability appraisal (“SA”). The SA is required to identify, describe and evaluate the likely significant effects on the environment of implementing the LDP and the reasonable alternatives, taking into account the objectives and geographical scope of the LDP. The draft LDP and its accompanying environmental report must be duly publicised and made available for the purposes of consultation. The responsible authority, post-adoption, must inform the consultation bodies and public consultees that the LDP has been adopted and indicate how environmental considerations and consultation responses have been taken into account.

Conservation of natural habitats and protected species

2.35 Directive 79/209/EC on the conservation of wild birds (“Birds Directive”) and Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora (“Habitats Directive”) were respectively implemented by the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010 (“2010 Regulations”).²⁷ Part 6 of the 2010 Regulations specifically amends the TCPA 1990 insofar as it affects applications for planning permission, development orders, grants of deemed planning permission, approvals for development and other consents and to ensure that any permission, approval, order or consent given under the TCPA 1990 is subject to the provisions of the Directives.

2.36 The Regulations apply to sites designated as Special Areas of Conservation (“SACs”) under the Habitats Directive and Special Protection Areas (“SPAs”) under the Birds Directive. SPAs and SACs are collectively referred to in the 2010 Regulations as “European sites”.²⁸ The Regulations make four principal amendments to planning legislation:²⁹

- (1) they require an LPA, before granting planning permission, to assess the implications of a proposed development affecting a European site and consult the relevant nature conservation body;³⁰
- (2) they require an LPA to review existing planning permissions which have not been fully implemented which are likely significantly to affect a designated SPA or classified SAC; and if necessary, take appropriate action;³¹
- (3) they prevent the General Permitted Development Order granting permitted development rights which adversely affect the integrity of an

²⁷ SI 2010 No 490.

²⁸ SI 2010 No 490, reg 8.

²⁹ V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012), para 27.03.

³⁰ SI 2010 No 490, reg 61.

³¹ SI 2010 No 490, reg 69.

SPA or SAC;³² and

- (4) they prevent existing and future simplified planning zone schemes and enterprise zone schemes from granting planning permission for development which is likely significantly to affect a European site and is not directly connected with or necessary to the management of the site.³³

³² SI 2010 No 490, regs 73 and 74.

³³ SI 2010 No 490, regs 79 and 80.

CHAPTER 3

THE CASE FOR A PLANNING CODE

INTRODUCTION

- 3.1 In his 2010 book, the distinguished judge, Lord Bingham, identified the core aim of the rule of law as being:¹

That all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.

- 3.2 Lord Bingham outlined eight principles which he saw as being key to supporting that core aim. Of these principles, the first is that:²

The law must be accessible and so far as possible intelligible, clear and predictable.

- 3.3 The volume and complexity of legislation produced by both the UK Parliament and the devolved legislatures mean that issues of inaccessibility are very real in the United Kingdom. The piecemeal, fragmented and inconsistent legislative framework for planning in particular is increasingly at risk of falling short of Lord Bingham's first principle.

- 3.4 The good law initiative promoted by the Office of the Parliamentary Counsel ("OPC") and the Cabinet Office³ is a recognition of the difficulties people may now experience in understanding and complying with legislation. OPC have challenged partners in government, Parliament and beyond to help promote good law. Our project aims to meet that challenge – its objective being to produce, through the process of codification, a clear and accessible piece of planning legislation for Wales.

- 3.5 Within the Welsh Government, there is a clear awareness of the need to improve accessibility and of the potential benefits of this exercise for Wales. It was acknowledged by the First Minister that:

A significant issue impacting greatly on the accessibility of Welsh

¹ T Bingham, *The Rule of Law* (2010), ch 3.

² T Bingham, "The Rule of Law" (2007) 66 *Cambridge Law Journal* 67.

³ Cabinet Office and Office of Parliamentary Council, *Good Law* (April 2013) <https://www.gov.uk/guidance/good-law> (last accessed 31 March 2016).

legislation is the condition of the statute book as a whole. Improving access to legislation and developing a Welsh Statute Book is a longstanding concern.⁴

- 3.6 During pre-consultation meetings with stakeholders we were made aware of the considerable support for consolidating, and improving the accessibility of, the existing legislative framework for planning. The Royal Town Planning Institute (“RTPI”) Cymru explained that:

[Members] strongly believe that planning law relating to Wales needs to be restated and consolidated in a single Act. The current position, exacerbated by the recent Planning (Wales) Act and the now significant diversion between the Welsh and English planning system, makes it overly complex to understand the legal basis in Wales.

- 3.7 The Law Society’s Planning and Environment Committee observed that:

The planning system is a prime example of the need for a programme to separate legislation affecting the major devolved functions into separate bodies of statute law extending to England only and to Wales. Since 2011 we have seen both the Welsh Government and the UK Government in relation to England pursuing with vigour programmes of legislative reform in pursuit of very different visions for the planning system and requiring major amendments to a common body of statute law. The resultant mix of provisions, some extending to Wales, some to England and other continuing to apply in both England and Wales, makes finding the applicable law more difficult and time consuming for planning law practitioners in both England and Wales and exceptionally difficult for non-legal professionals, let alone the members of the public who seek to engage with the respective planning systems.

- 3.8 Sir Wyn Williams, a High Court Judge and former Presiding Judge for Wales, similarly told us:

Planning law is vital to a host of everyday activities. The need to ensure that planning laws which apply only in Wales are accessible and easily understood is of very considerable importance. I am

⁴ Welsh Government, *Written Response to the report of the Constitutional and Legislative Affairs Committee entitled Making Laws in Wales* (June 2014). The other written submissions made to the inquiry may be found at: <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?lId=9054> (last visited 24 June 2016).

sure that the all those concerned with the application and enforcement of Welsh planning laws will give their whole hearted support to the view that there is an urgent need for a statutory provision which both simplifies and consolidates Welsh planning law. I have no doubt that without the involvement and expertise of the Law Commission it will be extremely difficult to bring forward such legislation.

- 3.9 The Irish Minister for the Environment, Mr Alan Kelly TD, recently commissioned an organisational review of An Bord Pleanála – an independent body determining planning appeals. The Review Group noted that the complexity of planning laws in Ireland presented operational difficulties for consent granting authorities and issues of user-accessibility for the public and planning practitioners.⁵ We consider these issues to apply as acutely to Wales as they do to Ireland.
- 3.10 Alongside recommendations for the operation of the Board, the Review Group recommended simplification of the body of legislation that governs the Irish planning system:⁶

Recommendation 1: That a greater emphasis and commitment be made to addressing the complexity of planning law, by codification and consolidation of the legislative framework, with the aim that the planning system operates within a clear comprehensive code. The Government should consider as a matter of priority the setting up of a legislative review with a view to proposing a simplification of the legislation.

- 3.11 In this chapter we consider the reasons why planning law in Wales is in need of consolidation and simplification. We shall look at the volume of the law, its clarity, coherence and perceived complexity. We shall consider how simplification and consolidation might be tackled, the forms that it could take, some of the challenges that such a project would entail and decisions that will need to be made.

DIFFICULTIES WITH THE CURRENT LEGISLATIVE FRAMEWORK

Volume and fragmentation of legislation

- 3.12 The modern planning system started with the need for a mechanism to control the use and development of land. The New Towns Act 1946, the Town and Country Planning Act 1947 and the National Parks and Access to Countryside

⁵ Independent Review Group, *Organisational Review of An Bord Pleanála* (March 2016), paras 2.9 to 2.10.

⁶ Above, para 6.7.

Act 1949 set up the framework for a system of control which, for the most part, continues to exist today. Unfortunately, the legislative clarity which was once afforded by three distinct Acts was short lived. The New Towns Act 1946 has now been replaced by the New Towns Act 1981, the National Parks and Access to Countryside Act 1949 has been supplemented by the Countryside Act 1968, Wildlife and Countryside Act 1981 and the Countryside and Rights of Way Act 2000. Critically, the Town and Country Planning Act 1947 was substantially amended by the Town and Country Planning Acts 1954, 1962, 1968, and 1971.

3.13 In 1990 the UK government sought to address specific concerns with regard to complexity of the law underpinning the planning system by a consolidation of the Town and Country Planning Act. The resulting Town and Country Planning Act 1990 (“TCPA 1990”), alongside the Planning (Hazardous Substances) Act 1990 (“Hazardous Substances Act”), the Planning (Listed Buildings and Conservation Areas) Act 1990 (“Listed Buildings Act”) and the Planning (Miscellaneous Provisions) Act 1990 represented a major consolidation of the existing law of England and Wales, and was intended to provide a robust framework for planning law thereafter.

3.14 The rationale for the separation was explained by the then Solicitor-General:⁷

The result of the constant addition of material into the text of the [Town and Country Planning Act 1971] and the repeal of extensive parts of it has been a loss of coherent structure. That is especially apparent in Part IV of the TCPA 1971 dealing with special controls. The system of controls relating to listed buildings and conservation areas and to hazardous substances are so voluminous as to justify whole Bills relating to those topics alone. They have therefore been consolidated separately in the Planning (Listed Buildings and Conservation Areas) Bill and the Planning (Hazardous Substances) Bill.

3.15 The set of 1990 Acts were described as a “remarkable achievement”,⁸ providing an apt opportunity to “correct a number of anomalies and inconsistencies of a technical nature”.⁹ The Listed Buildings Act consolidated provisions in the Town and Country Planning Act 1971 relating to listed buildings and conservation areas, producing a relatively self-contained code for the protection of architectural heritage. The Listed Buildings Act ties in closely with the TCPA 1990; however, instead of it incorporating all provisions referring to listed buildings and

⁷ *Hansard* (HL), 19 February 1990, vol 516, col 20.

⁸ *Hansard* (HC), 14 May 1990, vol 172, col 714 (Mr John Fraser MP).

⁹ V Moore and M Purdue, *A Practical Approach to Planning Law* (13th ed 2014), p 5.

conservation areas, several such provisions remain within the TCPA 1990 – for example, Part IX applies to land acquired under both Acts and Part XIV includes a power to set fees for appeals under both Acts.

- 3.16 The Hazardous Substances Act was derived from provisions inserted into the 1971 Act by the Housing and Planning Act 1986, which introduced a new system of control over hazardous substances. The 1990 consolidation divorced the hazardous substances provisions from the planning control powers in the Town and Country Planning Act 1971. This was considered a logical approach because although there is a close relationship between the two systems, they are conceptually and functionally different.¹⁰
- 3.17 The clarity of presentation created by the four separate consolidating Acts did not last. Further legislation devoted in whole or in part to planning was passed in each year from 1991 to 1995; since 2000 there have been a further six Acts of Parliament and four Acts of the Assembly. Changes introduced by subsequent Acts have often been made by inserting provisions into, and making amendments to provisions in, the TCPA 1990; these are difficult to follow without a consolidated text. In a recent article in the *Journal of Planning & Environment Law*, planning barrister Clive Moys noted that the “planning system is without doubt more complicated than ever before”.¹¹ He added:

The *Encyclopaedia of Planning Law* now extends to nine volumes whereas it was a mere three volumes in 1982. The planning system appears to be under close scrutiny and currently to enjoy a very high profile.

- 3.18 While there was once only one Town and Country Planning Act, there now exist many Acts.¹² Separate topics are not neatly confined within separate Acts, and the law in relation to connected matters is often spread between a number of different Acts, making it at best a complicated framework to follow. The problems associated with such a voluminous and piecemeal framework of legislation were observed by the good law initiative:¹³

The architecture and heterogeneity of the statute book can make legislation difficult. Users perceive legislation as more complex and burdensome than it actually is because of the barriers to accessing

¹⁰ *Encyclopaedia of Planning Law and Practice* (v 2) 2-3001.

¹¹ C Moys, “Has the Town and Country Planning Act 1990 Stood the Test of Time?” [2016] 5 *Journal of Planning & Environment Law* 7, p 16.

¹² See para 4.3 below.

¹³ Cabinet Office and Office of Parliamentary Counsel, *When Laws Become Too Complex* (April 2013).

and using it. Navigation between pieces of legislation is often a problem.

Quality of the law

- 3.19 In this paper we do not seek to evaluate those policy decisions which lie behind the main planning Acts. What we do wish to highlight, however, are some factors which affect the quality of the law and which are particularly pertinent in the context of planning legislation in Wales.
- 3.20 One key feature of good quality legislation is that it is consistent with and complements identified basic principles. In planning, there are core principles which underpin both plan-making and decision-making and any new legislation must avoid incongruity with these. For Wales, there is an expectation that all those in the planning system adhere to basic principles set out in Planning Policy Wales (“PPW”).¹⁴
- 3.21 A new Planning Code represents an opportunity to ensure that the new legislation is, on its face, sufficiently clear and certain in order to complement the principles which guide its use. Good quality legislation should be consistent and compatible with PPW.
- 3.22 Another feature of good quality legislation is that it is clear, as simple as possible and well-integrated with other laws. Unfortunately, however, there is often little time in a busy legislative programme for the type of simplification-led reforms which are necessary in order to try and achieve this. An exercise of simplification and consolidation is often much less politically attractive than policy driven reform.
- 3.23 A further feature of good quality legislation is that it is consistent with best practice in terms drafting and presentation. The Welsh Government prefers to restate provisions in Assembly Bills, where appropriate and practicable, rather than to amend legislation of the UK Parliament in so far as it applies to Wales.¹⁵ There are well rehearsed benefits to this approach. Broadly speaking it reduces complexity, allowing the reader to more easily identify provisions which apply to Wales. Equally, provisions enacted in English only (as the existing legislation would be in English only) are also made in Welsh.
- 3.24 Free-standing Welsh laws have been a feature of a number of the Bills which the Government has introduced; however, planning is an exception to this, with the

¹⁴ *Planning Policy Wales* (8th ed 2006) ch 4.

¹⁵ Welsh Government, *Written Response to the report of the Constitutional and Legislative Affairs Committee entitled Making Laws in Wales* (June 2014).

Planning (Wales) Act 2015 (“PWA 2015”) containing (for the most part) amendments of the Town and Country Planning Act 1990 and the Planning and Compulsory Purchase Act 2004 (“PCPA 2004”). Some justification for the PWA 2015 being an amending Act was provided by the indication that the Welsh Government would also be bringing forward:¹⁶

A further planning consolidation Bill [that] will bring together all existing Acts and further streamline the planning process.

Complexity of the law

- 3.25 Devolution in Wales has added a new dimension to an already complex situation, as the systems in the two countries have diverged, while continuing to share much legislation. Some, but not all, of the recent Westminster legislation is applicable to Wales, while some provisions are specific to Wales only and some have been commenced in England but not in Wales. This means that it can be very difficult, even for professionals, to understand which parts of the planning legislation apply in Wales.
- 3.26 There are a number of factors which currently increase the inherent complexity of planning law applicable to Wales:
- (1) legislation in areas of devolved competence must often be read in conjunction with other legislation applying to England and Wales.
 - (2) the vast majority of the existing legislation applying to Wales in areas within the competence of the National Assembly is legislation of the UK Parliament. Decoupling Wales-only provisions requires a concerted effort. On the other side of the coin, where such decoupling has occurred through Westminster Bills applying to England only, this has often left complex, old UK or England and Wales text in place only for Wales.
 - (3) the historic method of conferring executive powers on the old Assembly, in part through transfer of functions orders and in part (post-devolution) through Westminster Bills, requires the reader to understand that the text of the legislation does not reflect the current legal reality. Powers described in Acts of Parliament as being conferred on the “Secretary of State” are often in reality held by the Secretary of State in England while in Wales the power was held at first by the National Assembly and now by the Welsh Ministers. Similarly, following the coming into force of the Government of Wales Act 2006, a number of powers conferred upon the National Assembly on the face of statutes enacted since 1999 are now

¹⁶ National Assembly for Wales, *Plenary: Statement: Progress on Implementing "Energy Wales"* (May 2013).

held by the Welsh Ministers.¹⁷

Accessibility of the law

- 3.27 In relation to planning, Cardiff and Westminster have different policy objectives, which has inevitably resulted in increasing divergence between the two countries in certain matters.¹⁸
- 3.28 As a consequence of the often inconsistent and inadequate variety of ways in which these differences have been reflected in the law, the process of ascertaining which statutory provisions apply in Wales and which do not is often protracted.
- 3.29 A statutory provision may specify where it applies by including the words “in England” or “in Wales”. For example, section 61E of the TCPA 1990 states that “any qualifying body is entitled to initiate a process for the purpose of requiring a local planning authority *in England* to make a neighbourhood development order.” Checking whether – and, if so, how – a provision applies in relation to Wales is, however, often not always straightforward, involving a number of steps.
- 3.30 If, for example, a provision refers to a local planning authority (“LPA”), it is necessary to go to an interpretation clause (either in a separate miscellaneous Part at the end of the Act or throughout the Parts) to check whether reference is made to “county or county borough councils” (Welsh local authorities). If not, the provision does not apply in relation to Welsh LPAs.
- 3.31 For example, section 37 of the PCPA 2004 limits the definition of LPAs to those which exist in England: district councils, London borough councils, metropolitan district councils, county councils in relation to any area in England for which there is no district council, and the Broads authority. The effect of this provision is to exclude the application of Part 2 to Wales. Apart from the interpretation clause, there is no other indication that Part 2 applies exclusively to England.
- 3.32 In places, however, a provision may neither refer on its face to being applicable “in England” nor have an associated definition of an LPA. In these instances understanding that a section applies only in relation to England requires further prior knowledge of planning policy in Wales. For example, it is only clear that section 61P of the TCPA 1990, which makes provision for the LPA to make decisions on provisions relating to neighbourhood development orders, does not

¹⁷ Welsh Government, *Written Response to the report of the Constitutional and Legislative Affairs Committee entitled Making Laws in Wales* (June 2014)

¹⁸ For a wider discussion of problems of inaccessibility of law, both in England and Wales as a whole and with specific reference to Wales, see Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366.

apply to Wales if the reader knows that Wales does not have neighbourhood development orders.

- 3.33 Even where a provision applies in Wales, it may not apply in the manner indicated on the face of the provision. For example, references to the “Secretary of State” in legislation may have effect as references to the Welsh Ministers.¹⁹
- 3.34 Finally, it is necessary, particularly in the case of recently enacted provisions, to check the commencement provisions, including commencement orders, to see whether a provision has been commenced in relation to Wales. For example, LPAs in England and Wales have certain powers under sections 70A, 70B and 70C of the TCPA 1990 to decline to determine a planning application. These sections apply differently in England and in Wales, and the commencement provisions have to be checked carefully.
- 3.35 Different versions of section 70A of the TCPA 1990 apply in Wales and in England. In both England and Wales section 70A allows LPAs to decline to determine an application for planning permission which is the same or substantially the same as an application which, within the previous two years, has been called in and refused by the Secretary of State / Welsh Ministers or has been dismissed by them on appeal. However, in England, section 70A also allows an LPA to decline to determine a planning application where it has refused more than one similar application and there has been no appeal to the Secretary of State in the two year period preceding the submission of the application.
- 3.36 Section 70B of the TCPA 1990 allows LPAs to decline to determine overlapping applications where certain conditions are satisfied. On the face of the legislation, this applies in both England and in Wales. However, this provision has been commenced in England, but not in Wales.
- 3.37 The inherent complexity associated with checking legislation creates real issues of accessibility for those who use the system and need to ascertain the relevant statutory provisions applying in Wales. The current legislation is particularly inaccessible for those who are not generally familiar with the planning system.

Reviewing the balance between primary and secondary legislation

- 3.38 The proposed creation of a Planning Code affords a unique opportunity to review the balance between primary and secondary legislation in this area of the law. It is not our intention to fundamentally alter the relationship between primary and secondary legislation; there are substantial reasons to maintain the flexibility the traditional division allows.

¹⁹ For a full explanation, see Form and Accessibility of the Law Applicable in Wales (2015) Law Commission Consultation Paper No 223, paras 1.47 to 1.50.

- 3.39 Principally, we maintain that the Planning Code must be supported by a suite of secondary legislation. The planning system is voluminous, is highly technical and requires frequent amendment. Daniel Greenberg, editor of *Craies on Legislation*, noted:²⁰

The more complex the world becomes, the more complex becomes the form of regulation required to control activities in accordance with social and political policy, the less suited that regulation becomes to primary legislation and the more necessary it becomes to confer and exercise enabling powers.

- 3.40 Broadly speaking, we consider that the balance between primary and secondary legislation in the planning context has been struck correctly. Nevertheless, in the substantive phase of the project, we intend to assess the provisions on a case-by-case basis to ensure consistency of approach, bearing in mind the advantages and disadvantages of placing material in primary or secondary legislation.

- 3.41 The difficulty of achieving a rational balance between primary and secondary legislation has been much discussed, and the issue can be politically charged. On one hand, relegating subordinate detail to be settled by the executive can facilitate accessibility by ensuring that Acts remain simple and clear, leaving the “clutter” to be dealt with in regulations. The 1993 Report of the Hansard Society Commission, *Making the Law*, emphasised the merit of keeping bills as clear, simple and short as possible, stating:²¹

This not only makes Acts easier for the user to follow, but it helps Parliament to focus on the essential points ... [and keeps] the legislative process flexible so that statute law can be kept as up-to-date as possible.

- 3.42 A short, clear bill can allow users of legislation to get a good sense of the overall structure of the law, and then focus on the detail only of those parts of the system which are relevant to their concerns.

- 3.43 On the other hand, a single piece of legislation detailing most or all of the operation of the planning system could help to make the system transparent and improve accessibility. Navigating the law can be more difficult if provisions are spread across various pieces of primary and secondary legislation. Whilst a single lengthy Act spanning over 500 pages may itself present issues of user

²⁰ D Greenberg, *Craies on Legislation* (10th ed 2012) p 16.

²¹ The Report of the Hansard Society Commission on the Legislative Process, *The Hansard Society for Parliamentary Government* (November 1992), para 263.

accessibility, it is important to acknowledge that:

The increased length of Acts is not automatically and in itself a feature of complex legislation ... A short Act that requires the user to go to a complicated set of Regulations is not, overall, a simplifying measure.²²

3.44 The use of secondary legislation can relieve pressure on the Assembly's legislative timetable, given that it is not subject to the same levels of scrutiny as Assembly Acts. Generally, secondary legislation is either subject to "affirmative resolution" or "negative resolution". Affirmative resolution procedure requires a draft to be considered and debated by Assembly Members and approved by a resolution of the Assembly. The negative resolution procedure allows the instrument to be made without approval, but requires it to be laid before the Assembly. The Assembly then has a period within which to object by resolution ("annulment" procedure).

3.45 Secondary legislation can be amended without much, if any, expenditure of Assembly time. Legislation revised in light of experience or in order to react to changing circumstances is likely to be better suited to secondary rather than primary legislation. Sir Henry Jenkyns, former First Parliamentary Counsel, wrote in an official minute in 1893:

The method of delegated legislation permits of the rapid utilisation of experience and enables the results of consultation with interests affected by the operation of new Acts to be translated into practice ... It also permits of experiment being made and thus affords an opportunity, otherwise difficult to ensure, of utilising the lessons of experience.

3.46 The suite of secondary legislation made in February 2016 – relating, among other things, to developments of national significance,²³ development management,²⁴ pre-application services,²⁵ and validation²⁶ – reflects the frequency of

²² Cabinet Office and Office of Parliamentary Counsel, *When Laws Become Too Complex* (April 2013).

²³ Developments of National Significance (Procedure) (Wales) Order 2016, SI 2016 No 55; Developments of National Significance (Fees) (Wales) Regulations 2016, SI 2016 No 57; Developments of National Significance (Specified Criteria and Prescribed Secondary Consents) (Wales) Regulations 2016, SI 2016 No 53.

²⁴ Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2016, SI 2016 No 59.

²⁵ Town and Country Planning (Pre-Application Services) (Wales) Regulations 2016, SI 2016 No 61.

amendments made to the planning system and the importance of ensuring that legislation is sufficiently flexible to meet the needs of its users.

- 3.47 Moreover, much of the provision made in secondary legislation is not, in practice, well suited to Assembly scrutiny. Greenberg has noted:²⁷

there are many matters of fine technical detail that have to be addressed in modern legislation that will be neither efficiently nor adequately scrutinised by the mechanisms used for the passage of Bills.

- 3.48 Yet it is clear that any significant provision should, as a matter of principle, be subject to full scrutiny through the Assembly Bill procedure. Provisions directly affecting the lives of citizens, for example, by imposing duties or conferring rights should be deliberated and debated by their democratically elected representatives. Lord Judge, a former Lord Chief Justice, noted that, in respect of the UK Parliament:²⁸

Some statutory instruments do not require parliamentary scrutiny; many are not laid before Parliament, and some of those which are laid before Parliament come into force before they are laid ... With only seventeen instruments rejected in sixty-five years, and none in the Commons since 1979, it is difficult to avoid the conclusion that the Parliamentary processes are virtually habituated to approve them.

- 3.49 There is clearly a balance to be struck in each case, taking into account the importance of scrutiny by the National Assembly, the consumption of Assembly or Committee time, the significance of the provisions in question, the longevity of the provisions, the necessity of flexibility and the impact on user accessibility.

- 3.50 The National Assembly's Constitutional and Legislative Affairs Committee recently reviewed the appropriate balance between primary and secondary legislation in its report, *Making Laws in Wales*.²⁹ The Committee considered a range of evidence presented by the Welsh Government, local authority

²⁶ Town and Country Planning (Validation Appeals Procedure) (Wales) Regulations 2016, SI 2016 No 60.

²⁷ D Greenberg, *Craies on Legislation* (10th ed 2012) p 13.

²⁸ I Judge, *Ceding Power to the Executive; the Resurrection of Henry VIII* (April 2016), p 10 to 12.

²⁹ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015).

associations and political consultancies. The CLAC Report found that the “framework Bills” so far passed by the Assembly often leave too much detail to secondary legislation. It recommended that the Welsh Government review the balance between primary and secondary legislation and publish the outcome of that review, including the principles that it will apply to future drafting of Bills.

3.51 In response to the recommendation, the Welsh Government stated that it would review the factors that have been taken into account in light of the Committee’s findings, including whether the development of a set of principles would be appropriate. In our report on the Form and Accessibility of the Law Applicable in Wales, we recommend that legislative standards be introduced and include coverage of the issue of balance between primary and secondary legislation.³⁰ We shall take account of the results of the Welsh Government’s review as the project proceeds.

3.52 The substantive phase of the project will consider the use of secondary legislation in the light of the general principles described above, the results of the CLAC report and the proposed Welsh Government review as any legislative standards that are drawn up. The point of the exercise would not be to change the content of the law, but merely its location in the hierarchy of legislation. We consider below two examples which illustrate the process that will need to be carried out.

- (1) The role of the Planning Inspectorate in deciding appeals delegated from the Welsh Ministers is not contained in primary legislation. The power is conferred on the Welsh Ministers by Schedule 6 to the TCPA 1990 and the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) (Wales) Regulations 2015.³¹ On one hand, it seems illogical for there to be no reference to such an important actor in the planning system in primary legislation. On the other hand, the Welsh Ministers may wish to re-consider the identity of the appropriate appellate body for Wales. The importance of the law setting out transparently the current position must therefore be balanced against the possibility of future change and need for flexibility.
- (2) Part 6 of the Planning and Compulsory Purchase Act 2004 and the Planning (Wales) Act 2015 detail the framework of plan-making in Wales, but key information on how to participate in the process is found in schedules or secondary legislation. Only by examination of the Town and

³⁰ Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366, para 8.55.

³¹ SI 2015 No 1822.

Country Planning (Local Development Plan) (Wales) Regulations 2005³² is it possible to understand the key rights and duties for community participation in the creation of development plans and public consultation. The location of the key provisions on participation may need to be reconsidered in the substantive phase of the project.

CONCLUSIONS

- 3.53 Undertaking a codification exercise has the potential to do much more than produce an updated text. We think that there is scope for this exercise to extend beyond a traditional consolidation exercise. We consider this to be a rare opportunity to question whether certain features of the law should be retained for the future, rather than simply preserved within the parameters of a traditional consolidation exercise.
- 3.54 Such an exercise is likely to produce real practical benefits for those who work with the law (such as legal practitioners, local planning authorities, the Planning Inspectorate and the courts), those concerned with making it (such as the Assembly and Government) and for those who need to access or use it (such as businesses and members of the public).
- 3.55 For those who work with the law, codification can remove unnecessary burdens which flow from a piecemeal legislative framework, improve clarity and efficiency, and provide greater certainty in respect of how the system works.
- 3.56 Codification facilitates improvements in the planning process by creating a piece of legislation that is more accessible and easier for people to use. It is an opportunity to bolster public participation, and consider further the preparation of a legislative framework that is focussed on the needs of its users. It provides an opportunity to help promote economic growth by removing unnecessary complexities in order to create a smoother journey through the planning consent process. It is also an opportunity to fulfil commitments to consolidate the law.
- 3.57 For those who use the law, simplification results in greater clarity and certainty in respect of how the system works and improvements in efficiency, leading to a reduction in transaction costs, professional and consultant costs. Fundamentally, it should make the planning system easier for the public to understand.
- 3.58 **Consultation question 3-1: We consider that there is a strong case for creating a new Planning Code. Do stakeholders agree?**

³² SI 2015 No 2839.

3.59 Consultation question 3-2: We ask stakeholders' views on the distribution of provisions between the Planning Code – either in the main body of the legislation or in a Schedule – and secondary legislation made under it

CHAPTER 4

SCOPE OF THE FIRST PART OF A PLANNING CODE

INTRODUCTION

- 4.1 We consider it necessary to define the scope of our work, both in view of what we are seeking to achieve at the present stage and the wider context of eventual complete codification.
- 4.2 It seems inevitable that in order to codify the whole of the law relating to planning, a series of codification exercises will need to be carried out over a period of time. The precise scope of each new piece of codification will need to be determined. There would be obvious benefits to grouping together provisions which deal with similar subject-matter.
- 4.3 The volume of legislation relating to planning and the use of land in Wales is immense, consisting at least of the following 48 separate pieces of legislation. The legislation is entirely devoted to planning and land use except where otherwise indicated.
- (1) National Parks and Access to the Countryside Act 1949
 - (2) Agricultural Land (Removal of Surface Soil) Act 1953
 - (3) Historic Buildings and Ancient Monuments Act 1953
 - (4) Opencast Coal Act 1958
 - (5) Caravan Sites and Control of Development Act 1960
 - (6) Land Compensation Act 1961
 - (7) Compulsory Purchase Act 1965
 - (8) Civic Amenities Act 1967
 - (9) Agriculture Act 1967 (Part III, Schedule 5 (rural development boards))
 - (10) Forestry Act 1967 (Part II)
 - (11) Caravan Sites Act 1968
 - (12) Countryside Act 1968
 - (13) Mobile Homes Act 1975
 - (14) Development of Rural Wales Act 1976
 - (15) Inner Urban Areas Act 1978
 - (16) Ancient Monuments and Archaeological Areas Act 1979

- (17) Local Government, Planning and Land Act 1980 (Parts XV, XVI, XVII, XVIII)
- (18) New Towns Act 1981
- (19) Wildlife and Countryside Act 1981 (Parts II, III; Schedules 10A – 17)
- (20) Compulsory Purchase (Vesting Declarations) Act 1981
- (21) Acquisition of Land Act 1981
- (22) Derelict Land Act 1982
- (23) Wildlife and Countryside (Amendment) Act 1985
- (24) Wildlife and Countryside (Service of Notices) Act 1985
- (25) New Towns And Urban Development Corporations Act 1985
- (26) Mineral Workings Act 1985
- (27) Housing and Planning Act 1986
- (28) Environmental Protection Act 1990 (Part VII)
- (29) Town and Country Planning Act 1990
- (30) Planning (Listed Buildings and Conservation Areas) Act 1990
- (31) Planning (Hazardous Substances) Act 1990
- (32) Planning (Consequential Provisions) Act 1990
- (33) Planning and Compensation Act 1991
- (34) Transport and Works Act 1992 (Part I)
- (35) Leasehold Reform, Housing and Urban Development Act 1993 (Part III)
- (36) Local Government (Wales) Act 1994
- (37) Environment Act 1995 (Part III, Schedules 7 – 10 (national parks); section 96, Schedule 13, 14 (mineral planning permissions); section 97 (hedgerows))
- (38) Countryside and Rights of Way Act 2000
- (39) Planning and Compulsory Purchase Act 2004
- (40) Natural Environment and Rural Communities Act 2006 (Parts 1, 5, 6)
- (41) Commons Act 2006 (provisions relating to village greens and development on common land)
- (42) Planning Act 2008

- (43) Marine and Coastal Access Act 2009 (Part 9)
- (44) Mobile Homes (Wales) Act 2013 (Parts 4 and 5)
- (45) Criminal Justice and Courts Act 2015 (sections 91, 92, Schedule 16).
- (46) Planning (Wales) Act 2015 (Act of the National Assembly for Wales)
- (47) Historic Environment (Wales) Act 2016 (Act of the National Assembly for Wales)
- (48) Environment (Wales) Act 2016 (Act of the National Assembly for Wales)

4.4 We have had regard to considerations of priority and resource in establishing the scope of the initial codification exercise. We have sought to identify the legislation or parts of it which are most frequently used and, on that basis, arguably most in need of early attention. We consider these to be the provisions dealing with the making of development plans and setting out the process of development management. This covers the process for managing new development by granting or refusing planning permission, planning appeals and investigating breaches of planning control. We refer to these development planning and development management functions of the planning system as the core parts of the system.

4.5 It is these core parts which are used to manage a wide range of planning activities, from small scale domestic extensions to large scale residential, mixed use, commercial or energy developments. It is also these parts of the planning system – and in particular, the process of granting planning permission and the promotion of development – which have close links to the Welsh economy. Codification has a role to play in securing the effective functioning of these core parts of the system by making the legislation as coherent and accessible as possible.

4.6 We are aware that resources are finite. While it is difficult to gauge precisely the length of time which would be required to undertake a codification exercise, it is self-evident that the larger it is, the longer it will take, and the more resources (lawyers, legislative drafters and policy officials) will be required. For this reason, there is a case for dividing up the work which needs to be done in order to consolidate and simplify the planning system into discrete topics.

4.7 Guided by these parameters, we consider that the focus of this project should be on producing the first part of a Planning Code dealing with the core parts of the planning system: planning and development management, as identified above.

4.8 We have also given some thought to what might form the subject-matter of later phases of codification. Whilst it is unnecessary to reach a firm view on that issue at present, we have wished to satisfy ourselves that a first phase dealing with development planning and development management would be a satisfactory precursor to subsequent codification exercises. Our provisional view is that a workable scheme of codification commencing with planning and development management could take the following shape:

- (1) Development Planning and Development Management: in summary, this

would deal with planning authorities, development plans, planning permission, appeals, statutory challenge, enforcement, and associated topics; we expand on this outline of subject-matter later in this chapter.

- (2) Historic Environment: the Welsh Government have indicated that Cadw¹ may be considering the possibility of an eventual consolidation of historic environment legislation being added to the Assembly programme; such a code could contain provisions regarding ancient monuments, archaeological areas and those parts of the legislation on listed buildings and conservation areas that are not codified along with planning and development management.²
- (3) Rural Environment: this would bring together the disparate body of legislation dealing with national parks, areas of outstanding natural beauty (“AONBs”), nature reserves, trees and forestry, hedgerows and the countryside generally.
- (4) Regeneration and Development: this would deal with the powers of Ministers and local planning authorities (“LPAs”) relating to the improvement and regeneration of land, the acquisition and development of land for planning purposes, requiring landowners to remedy the condition of their land, powers to improve derelict land, grants for improvements, and improving housing.
- (5) Hazardous Substances: there could be a consolidation of the Planning (Hazardous Substances) Act 1990, incorporating the provisions relating to hazardous substances contained in the Town and Country Planning Act (“TCPA 1990”).

4.9 In suggesting this, we recognise that there is more than one way of dividing up topics and that no perfect scheme of neat compartmentalisation is achievable. The phased approach that we contemplate will leave many of the existing Acts of Parliament at least partially in force in relation to Wales until the codification process is complete – for example, those parts dealing with regeneration and development or the acquisition of land.

4.10 We recognise that this will, for a time, leave the existing statute book in an unsatisfactory state – though, we hope, a progressively less unsatisfactory one as more of the legislation is codified. The leaving of provisions in the existing England and Wales legislation would need to be a temporary measure, pending eventual resolution of the problem by more extensive codification.

4.11 The purpose of this chapter is to identify the scope of an initial code dealing with planning and development management. The topics we suggest covering derive from various legislative sources, but predominantly from our analysis of the existing primary legislation. We consider it important to consider the issue of the scope of this initial exercise in some detail in order to ensure that the topics we

¹ Cadw is the Welsh Government's historic environment service.

² It is our preliminary view expressed in Chapter 7 that separate consent regimes regarding development in conservation areas and/or affecting listed buildings could sit within the mainstream planning permission regime

identify for inclusion are those which are essential to a comprehensive presentation of the law in this area.

- 4.12 Following the identification of the topics to be included in a codification of planning and development management, the substantive phase of the project will consider each of them in more detail. This will include consideration of whether the balance of coverage in primary and secondary legislation is appropriate, whether technical amendments are required in order to improve, rationalise or simplify the text and what scope exists for useful codification of case law.
- 4.13 In identifying the topics within the scope of a planning and development management code, we shall consider the need for the text to:
- (1) set out the necessary framework to enable a reader to understand the law and explain to an appropriate degree the fundamental operations of the planning system;
 - (2) provide the right balance of information in order to be as clear, straightforward and coherent as possible; and
 - (3) be relatively self-contained and capable of guiding users of the planning system.

TOPICS WHICH MIGHT COMPRISE AN INITIAL PIECE OF CODIFICATION FOCUSSING ON PLANNING AND DEVELOPMENT MANAGEMENT

- 4.14 In our analysis of the topics which might comprise a planning and development management code, the pieces of legislation with which we are predominantly concerned are the main planning Acts that contain the most frequently used provisions. We outline these main Acts below; they are those with which consultees are likely to be most familiar.³
- 4.15 From this legislation we have drawn out the topics which might form a new piece of codified legislation dealing with planning and development management. As a result of the way in which the law has developed, coverage of these topics is spread over a number of different Acts. We could not, therefore, limit ourselves to looking at specific pieces of legislation. Predominately, however, the topics we refer to are covered by the main planning Acts.
- 4.16 Similarly, while we principally discuss primary legislation, we include consideration of whether certain provisions of secondary legislation might usefully be incorporated into the new planning code in order to provide a more comprehensive presentation of the law.

The main planning Acts

- 4.17 In Wales, the main interlocking planning Acts currently in force are:
- (1) the Town and Country Planning Act 1990 (“TCPA 1990”) which consolidated previous town and country planning legislation and sets out

³ As the list in paragraph 4.3 of this chapter indicates, the main planning Acts do not, however, represent the totality of the planning legislation in Wales and there exists a somewhat incoherent array of further planning legislation.

how development is regulated;

- (2) the Planning (Listed Buildings and Conservation Areas) Act 1990 which regulates the development of land insofar as works relate to listed buildings or conservation areas;
 - (3) the Planning (Hazardous Substances) Act 1990 which regulates the development of land where works relate to hazardous substances;
 - (4) the Planning and Compulsory Purchase Act 2004 which made changes to development plans, development control, compulsory purchase and application of the Planning Acts to Crown land;
 - (5) the Planning Act 2008 (“PA 2008”) which sets out the framework for the planning process for nationally significant infrastructure projects (“NSIPs”) and provided for the community infrastructure levy which is a locally based development tax;
 - (6) the Planning (Wales) Act 2015 (“PWA 2015”) which makes changes to development plans, the development management system, enforcement and appeals, applications to Welsh Ministers and the way in which LPAs work together; and
 - (7) the Historic Environment (Wales) Act 2016 which improves the control of works to listed buildings and scheduled monuments.
- 4.18 We have not listed the Localism Act 2011, as its provisions in relation to planning matters do not apply in Wales.
- 4.19 In relation to the PA 2008, NSIPs are currently excluded from devolved powers in respect of town and country planning, and the Community Infrastructure Levy is not a devolved tax in Wales.

TOPICS WE PROVISIONALLY REGARD AS WITHIN THE SCOPE OF THE FIRST PIECE OF CODIFICATION

Core planning provisions

- 4.20 Accessibility is key to the efficient operation, as well as the democratic legitimacy, of the planning system. We consider it necessary that the primary legislative framework on planning and development management cover the matters we outline below. They concern the central and most frequently used aspects of the planning system.
- 4.21 To a large degree, these matters are found within Parts 3 and 7 of the TCPA 1990, Part 6 of the PCPA 2004, as amended (largely) by the Planning (Wales) Act 2015.⁴ There are, however, some fundamental provisions – in particular on the basic framework of institutions responsible for decision-making and their role in the process and the information necessary for third parties to partake in the planning process – contained in secondary legislation or guidance. While in principle we consider these provisions within scope, in the substantive phase of

⁴ Planning (Wales) 2015, Explanatory Note, para 4.

the project there will be issues to consider with regard to the necessary balance between primary and secondary legislation, as outlined in Chapter 3.

Purpose of the planning system

- 4.22 Prior to the PWA 2015 there was no statutory statement of the purpose of the planning system. It was, however, clear from planning policy,⁵ that:

The aim of the planning system is to make planned provision for an adequate and continuous supply of land to meet society's needs in a way that is consistent with sustainability principles.

- 4.23 Although this principle was embedded in the plan-making process, it did not apply equally to the decision-making functions undertaken by LPAs. With the introduction of a statutory statement of purpose in the PWA 2015 – which requires local planning authorities, the Welsh Ministers and other public bodies, when undertaking any development plan or development management functions, to contribute towards sustainable development – a statutory statement of this requirement in relation to both development planning and planning applications was provided. It would seem appropriate for this to be stated at the beginning of the new Planning Code.

How the planning system is administered

- 4.24 The planning system is administered by a number of key decision-making bodies. LPAs administer much of the planning system and play an important role in preparing local development plans (“LDPs”), determining planning applications and carrying out enforcement against unauthorised development.
- 4.25 LPAs can delegate their power to determine an application for planning permission to a planning committee.⁶ Amendments have been made in respect of planning committees and delegation by the PWA 2015, but these are yet to be commenced. LPAs also appoint officers to assist with the operation of the planning system. Most local or uncontroversial applications are decided through delegated decision-making powers. It would seem appropriate for a new code to provide that an LPA may arrange for the discharge of its functions, including the power to determine an application for planning permission by a committee or by delegation to an officer of the authority rather than this information being found separately in local government legislation.⁷
- 4.26 The Welsh Ministers oversee the planning system as a whole, as well as having a more direct role in a small number of decisions through the appeals system, the call-in process and decisions on Developments of National Significance. The detail governing the decision-making by Welsh Ministers should remain in secondary legislation; however, given the reported lack of clarity regarding the role of the Welsh Government in relation to planning,⁸ codification provides an

⁵ Welsh Government, *Planning Policy Wales* (8th ed 2016) para 2.1.

⁶ Local Government Act 1972, s 101.

⁷ Local Government Act 1972, s 101.

⁸ Welsh Government and Beaufort Research, *Public Attitudes Towards the Planning System in Wales* (June 2012).

opportunity to outline the principles of their powers and their role in the planning system.

- 4.27 Appeals are administered by the Planning Inspectorate, which reports to the Secretary of State and Welsh Ministers. Planning Inspectors are responsible for deciding most planning and enforcement appeals on behalf of Welsh Ministers. As outlined in Chapter 3, the substantive phase of the project will consider the correct balance between primary and secondary legislation and, in relation to the Planning Inspectorate, weigh up possible improvements in accessibility by making some reference in primary legislation to the role it performs against the need for flexibility to be retained where progressive devolution may result in fresh consideration with regard to the appropriate appellate body for Wales.

The nature of development

- 4.28 The TCPA 1990 sets out the circumstances in which planning permission is required by providing a statutory definition of “development”⁹ and detailing categories of work which do not amount to development.
- 4.29 Development does not in all instances require a planning application; in some cases development will be allowed under permitted development rights. Permitted development rights are a national grant of planning permission which allow certain building works and changes of use to be carried out without a planning application.
- 4.30 There is currently no reference in primary legislation to the circumstances in which planning permission is granted by virtue of a permitted development order, without requiring an application for planning permission to the LPA. It would seem appropriate for the project to consider how general principles governing permitted development rights might be set out (perhaps with the detail left to secondary legislation).¹⁰ These might include the general rule that exclusions are subject to conditions, limitations¹¹ and special rules.¹²

The plan making process

- 4.31 It will be necessary to set out the principles for plan-making, basic details regarding the different types of plan and who is responsible for each, and the procedure for making each type of plan.
- 4.32 It will be important to retain the level of clarity provided by the PWA 2015 in respect of the relationship between the various types of development plan – local development plans, strategic development plans (“SDPs”) and the National Development Framework (“NDF”), including how to deal with conflicts between

⁹ Town and Country Planning Act 1990, s 55.

¹⁰ The Town and Country Planning (General Permitted Development) (Amendment) (Wales) Order 2016, SI 2016/29; Town and Country Planning (General Permitted Development) Order 1995, SI 1995/419.

¹¹ Town and Country Planning (General Permitted Development) Order 1995, sch 2.

¹² Special rules apply to permitted development rights where they relate to development specified in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824.

them.¹³ Provision on how their preparation relates to Planning Policy Wales and Technical Advice Notes may also be useful. In the Republic of Ireland, for example, the Planning and Development Act 2000 provides for a hierarchy of plans prepared by regional and planning authorities. Part II of the Act contains separate chapters on development plans, local area plans and regional planning guidelines.

4.33 While Part 6 of the PCPA 2004 and the PWA 2015 detail the framework of plan making in Wales, the key elements of participation and consultation in relation to development plans are found in schedules and / or secondary legislation. In respect of LDPs, the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 make provision for community involvement and participation and public consultation. Conversely, in respect of the NDF, provision for Welsh Ministers to prepare and publish a statement of public participation setting out their policies relating to consultation carried out in preparing this plan is made in primary legislation.¹⁴ We consider it appropriate for the substantive phase of the project to review the presentation of rights and duties regarding public participation in the creation of development plans and the need for consistency in their treatment in primary legislation.

4.34 Consideration should also be given in the substantive phase of the project to the coherence and consistency of basic provision made in relation to plans. For example, provision on the role of strategic planning panels (single purpose bodies set up for the purpose of preparing strategic development plans) is not found in the main body of the PCPA 2004 but in Schedule 2A to the Act.¹⁵ The substantive phase of the project provides an opportunity to consider whether these provisions might be appropriately included in the main body of the new Planning Code.

The process of seeking planning permission

4.35 There are numerous stages in the process for obtaining planning permission. They include the following:

- (1) Pre-submission requirements of pre-application consultation and the provision of pre-application services.¹⁶ The PWA 2015 introduced a requirement to carry out pre-application consultation for certain types of development and provided power for Welsh Ministers to make regulations in connection with the provision of pre-application services.¹⁷
- (2) Application requirements with regard to the form of applications,¹⁸ fees for making applications,¹⁹ validation requirements²⁰ and the power to

¹³ Planning and Compulsory Purchase Act 2004, s 38(5).

¹⁴ Planning (Wales) Act 2015, s 60A.

¹⁵ See Planning (Wales) Act 2015, s 4(2) and sch 1.

¹⁶ Pre-application services refer to the provision of information and assistance by a LPA prior to an application for planning permission.

¹⁷ Planning (Wales) Act 2015, ss 17, 18.

¹⁸ Town and Country Planning Act 1990, s 62.

¹⁹ Planning (Wales) Act 2015, s 54.

decline to determine applications.

- (3) Post-application requirements regarding notification, publication²¹ and consultation. There are requirements to consult once the application has been submitted, but before the LPA's decision is taken. These requirements comprise:
 - (a) the duty of applicants to give notice and the duty of LPAs to publicise applications;
 - (b) the duty of LPAs to take account of representations made in response to the notice and publicity; and
 - (c) the duty of LPAs to consult with statutory consultees and take account of their representations.
- (4) Applications directly to the Welsh Ministers in two circumstances: first, where the application is for a development of national significance, and secondly where the application would otherwise be made to an LPA, but that LPA has been designated by the Welsh Ministers as performing poorly. These provisions have not yet been commenced.
- (5) Determination of the application, which includes the approach to determining a planning application (regard to the development plan unless material considerations indicate otherwise) and the negotiation and execution of any section 106 agreement²² between a developer and LPA in order to secure community infrastructure,²³ mitigate the impact of new developments upon existing community facilities, restrict the development or use of the land in a specified way or require specific operations or activities to be carried out on the land.
- (6) The grant of planning permission, which will almost always be subject to conditions. Conditions can be used to enhance the quality of development or ameliorate any adverse effects of development so as to enable planning permission to be granted where it would otherwise have been refused. The validity of a condition can be challenged in several ways. The developer may appeal against the imposition of a condition under section 78, to remove or vary conditions under section 73, or against an enforcement notice alleging a breach of condition under section 174.
- (7) Following the grant of planning permission there may be a need to make small scale amendments to a permitted scheme, in order to take account

²⁰ Planning (Wales) Act 2015, s 29.

²¹ Town and Country Planning Act 1990, s 65.

²² Town and Country Planning Act 1990, s 106

²³ Planning applications may be liable for a charge under the Community Infrastructure Levy, introduced by the Planning Act 2008, pt 11 if the LPA has adopted a charging schedule.

of changes as the design and development process unfolds.²⁴

- (8) An application may be made for discharge of conditions which have been complied with.
- 4.36 The law as it currently stands deals comprehensively and in some detail with the process for seeking planning consent. It is predominantly set out within Part 3 of the TCPA 1990 as amended by the PWA 2015, although not all the procedural information can be accessed in one place. For example, it is necessary to refer both to section 70(2) of the TCPA 1990 and to section 38(6) of the PCPA 2004 to understand the extent to which development plan policies are material to an application for planning permission, and the requirement for the decision to be taken in accordance with the development plan unless there are material considerations that indicate otherwise.
- 4.37 Within the substantive phase of the project, consideration should be given to the principles of participation within this part of the process. Much of the provision on this is currently contained within secondary legislation, but presenting such basic information on the face of a new planning Act might improve accessibility, particularly for the public.

Remedies

- 4.38 Remedies are required in order to provide a means to challenge planning decisions. Decisions are typically challenged by way of appeal,²⁵ however, there are other routes of redress for people aggrieved by planning decisions.
- 4.39 Most planning applications are determined in the first instance by the LPA. Appeal is possible where the LPA refuses an application or fails to determine it within a certain time. Appeals are made to the Welsh Ministers, and in practice are usually determined by a Planning Inspector. Depending on the scale and complexity of the planning application, there are a number of procedures that may be used to determine the appeal, one of which will be selected by the Planning Inspectorate. The appeal may be allowed or dismissed, or any part of the LPA's decision may be reversed or varied (whether the appeal relates to that part of it or not).²⁶
- 4.40 The decision of the Welsh Ministers or Planning Inspectorate can be challenged, within the 6 week time limit, under section 288 of the TCPA 1990 by the appellant or someone who took a "sufficiently active role in the planning process."²⁷ The decision of an LPA can only be challenged in the Planning Court by judicial review.²⁸ The claimant must have a sufficient interest in the matter to which the application relates, and must have acted within the six week time limit.

²⁴ Town and Country Planning Act 1990, s 73 (minor material amendments), s 96A (non-material amendments)

²⁵ Town and Country Planning Act 1990, s 78.

²⁶ Town and Country Planning Act 1990, s 79(1).

²⁷ Town and Country Planning Act 1990, ss 284, 288. See *Eco-Energy (GB) Ltd v First Secretary of State* [2005] P&CR 5 at [7].

²⁸ Civil Procedure Rules, pt 54.

- 4.41 Beyond legal challenges, it is possible to make a complaint about the administration of public services to the Public Services Ombudsman for Wales, established by the Public Services Ombudsman (Wales) Act 2005. The Ombudsman can investigate (among other things) “maladministration” by the Welsh Ministers and local government. This includes planning-related decisions. The Ombudsman cannot look at the merits of the decision, but can rule on whether the correct process was used. The main limit on the Ombudsman’s power is the inability to investigate matters in respect of which the complainant may take action in the courts.²⁹
- 4.42 In addition, mediation is an alternative non-statutory remedy. It is a way of resolving disputes without the issue having to go to court. It involves an independent third party (the mediator) whose role is to help parties come to an agreement. Mediation, within the wider scope of alternative dispute resolution, is encouraged and facilitated in civil litigation. In the context of the planning system, mediation may, for example, be appropriate in pre-application consultation, following the refusal of an application or unsuccessful appeal should the applicant be looking to vary or re-design a proposal, in the preparation of a development plan, in entering into section 106 planning agreements and in advance of planning authorities carrying out full enforcement measures.
- 4.43 The pre-action protocols in the Civil Procedure Rules explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. An unreasonable failure to mitigate could result in costs sanctions.
- 4.44 Planning remedies are drawn from a number of statutory and non-statutory sources. Planning appeals and statutory challenges are provided for by the TCPA 1990, as amended by the PWA 2015. Judicial review is separately dealt with by the Supreme Court Act 1981 and Part 54 of the Civil Procedure Rules. Currently there is no legislative foundation in planning for application to the Ombudsman or mediation.
- 4.45 Within the substantive phase of the project consideration should be given to the inclusion of a legislative “signpost” which refers the user to those remedies which are available beyond the TCPA 1990 and PWA 2015. This would not be designed to create a statutory duty, but rather, to indicate the voluntary processes that an applicant may engage in before dispute resolution in the courts. It would allow the production of a coherent and comprehensive text which fully sets out the range of options for access to justice, while not requiring additional provisions to be brought into the Planning Code, possibly creating a confusing overlap with other legislation.
- 4.46 Alternatively, the Scottish Government have produced a guide on the use of mediation following the Planning etc (Scotland) Act 2006, detailing the particular opportunities for the use of mediation in planning.³⁰ Their current review of planning is consulting on whether there should be specific references in future

²⁹ National Assembly for Wales, *Consideration of Powers: Public Services Ombudsman for Wales* (May 2015).

³⁰ Scottish Government and Core Solutions Ground, *A Guide to the Use of Mediation in the Planning System in Scotland* (March 2009).

policy to the use of mediation in planning.³¹ It may be that as an alternative to the consideration of a legislative “signpost”, guidance is produced to complement the new Planning Code and set out the alternatives for access to justice.

Enforcement

- 4.47 The law in respect of enforcement is currently presented within Part 7 of the TCPA 1990, as amended by the PWA 2015. These parts comprehensively provide the basic framework governing enforcement.
- 4.48 Enforcement provisions are required to deal with breaches of planning control – defined as carrying out development without the required planning permission or failing to comply with any conditions or limitation subject to which planning permission has been granted.³² Subject to minor exceptions, carrying out development without planning permission or in breach of conditions does not constitute a criminal offence.
- 4.49 Where the LPA thinks that there has been a breach of planning control, they can carry out action before issuing an enforcement notice. An LPA may issue an enforcement warning notice where it appears that there has been a breach of planning control and there is a reasonable prospect that, if an application for planning permission in respect of the development concerned were made, planning permission would be granted.³³ The LPA may also serve a temporary stop notice if they think that there has been a breach of planning control which is so serious that they consider that the activity (or any part of the activity) which amounts to the breach should be stopped immediately, while they consider what further enforcement action should be taken.³⁴
- 4.50 The main sanction provided by planning law is an enforcement notice, which can be served by an LPA on a developer. It is only if the enforcement notice is not complied with that a developer will have committed a criminal offence. In addition to the enforcement notice, the LPA also have other powers relating to enforcement.
- 4.51 LPAs have the power to serve a breach of condition notice on any person who is carrying out or has carried out the development in breach of a condition attached to a planning permission, requiring them to secure compliance with such conditions as are specified in the notice.³⁵
- 4.52 There is also a stop notice procedure available to LPAs to impose a ban on activities that are being carried out in breach of planning control, while waiting for an enforcement notice to come into effect.³⁶ Unlike a temporary stop notice, a stop notice has to be served in conjunction with an enforcement notice. Once issued, a stop notice prevents a person from delaying the operation of an

³¹ Scottish Government, “Wider use of mediation in planning” (19 February 2016).

³² Town and Country Planning Act 1990, s 171A(1).

³³ Town and Country Planning Act 1990, s 173ZA inserted by PWA 2015.

³⁴ Town and Country Planning Act 1990, s 171E(1).

³⁵ Town and Country Planning Act 1990, s 187A .

³⁶ Town and Country Planning Act 1990, s 183.

enforcement notice (for example, by appealing the notice) and continue to develop without planning permission.

Ancillary planning provisions

- 4.53 Certain other provisions should be included within the proposed Planning Code to ensure its efficient operation. They often come into play as a consequence of the operation of the core provisions. These include the following.

Validity of decisions

- 4.54 Part XII of the TCPA 1990 provide mechanisms for challenging the validity of certain plans, decisions, notices and orders – notably decisions made by the Welsh Ministers.³⁷ Other decisions – notably decisions by LPAs to grant permission or consent – can only be challenged by way of an application for judicial review under Part 54 of the Civil Procedure Rules.

Financial provisions

- 4.55 These provisions include such matters as fees to be charged for planning applications, and the responsibility of the LPA for costs associated with planning inquiries, expenses and compensation.³⁸

Miscellaneous and general provisions

- 4.56 These provisions deal with a wide variety of largely unrelated matters including the application of the TCPA 1990 to special cases such as mineral workings or land owned or developed by local authorities, the delegation of local planning authority functions in relation to applications, the determination of the procedure for certain proceedings, the procedure for local inquiries and other hearings, and rights of entry.
- 4.57 In addition there are provisions which deal with the application of core provisions in the case of particular types of development. These provisions deal with things done in the course of undertaking core planning activities such as obtaining planning permission or enforcement, so in this sense are part of the development management system, despite the fact that they may only be of interest in quite specific circumstances. We consider that such provisions should be included within the Planning Code. They include matters such as the following:

Development affecting highways

- 4.58 These provisions enable the stopping up of highways or extinguishing rights of way. Some provisions relate to powers which can only be exercised to facilitate development in accordance with a planning permission, but others may be exercised in connection with the acquisition of land for planning purposes or to allow mineral workings to take place.

Statutory undertakers

- 4.59 These provisions deal with the manner in which the development management

³⁷ Town and Country Planning Act 1990, pt XII.

³⁸ Town and Country Planning Act 1990, pt XIV.

system applies to statutory undertakers. Statutory undertakers, as defined in section 262 of the TCPA 1990, means persons authorised by any enactment to carry on any railway, light railway, tramway, road transport, water transport, canal, inland navigation, dock, harbour, pier or lighthouse undertaking, or any undertaking for the supply of hydraulic power and a relevant airport operator.

Crown land

- 4.60 These provisions deal with planning permission and enforcement in relation to Crown land.

Rights to require purchase of land

- 4.61 These provisions relate to requiring local authorities to buy land in particular circumstances where its value may be adversely affected by planning decisions.

Compensation

- 4.62 These provisions deal with compensation for the revocation of planning permissions.

Land blighted by development proposals

- 4.63 The TCPA 1990 sets out a number of circumstances which trigger planning blight, including, amongst others, where land is included in a development plan (which is often the case where town centre regeneration projects are proposed) and where land is safeguarded for a specific purpose (as is happening with the HS2 railway in England). Safeguarding is a planning tool used to protect the land needed to build and operate a proposed development (in the case of HS2) from conflicting development.

- 4.64 Blight under the TCPA 1990 will only apply where land is identified for the functions of certain public bodies or statutory undertakers or affected by proposals of local authorities or ministers who are exercising powers in relation to development or regeneration of land. Blight notice procedure is a form of inverse compulsory purchase. The procedure entitles a landowner to require a LPA to acquire his or her interest in the land as a recognition of the fact that property values often slump when land is affected by a proposed public work. The blight provisions, currently in Part 6 of and Schedule 13 to the TCPA 1990, are tied to the grant of permission or the allocation of land in a development plan.

Other consent regimes

- 4.65 We deal with the concept of drawing together separate consent regimes for works to listed buildings, works in conservation area consents and advertising in more detail in Chapter 6. If we conclude that the consent regimes should be aligned with planning, we consider that they should be included within a code dealing with planning and development management.
- 4.66 The inclusion of these topics within the first part of a Planning Code would, however, leave certain provisions behind which deal with topics not analogous with the core planning consent process, such as the listing of special buildings, the prevention of deterioration and damage of buildings, the designation of conservation areas and grants in conservation areas. We consider that this

assorted selection of provisions might fit more appropriately within a broader consolidation of legislation dealing with the historic environment.

Controls relating to listed buildings

- 4.67 The Planning (Listed Buildings and Conservation Areas) Act 1990 (“Listed Buildings Act”) creates a regime for designating and protecting the historic environment.
- 4.68 There are links between provisions contained within the Listed Buildings Act and the central provisions. These are procedural provisions which provide for the making of applications and enforcement, and how the existence of listed buildings or conservation areas affect the exercise of planning functions.

Controls relating to conservation areas

- 4.69 The Listed Buildings Act also creates a regime for designating and protecting conservation areas.
- 4.70 There are links between provisions contained within the Listed Buildings Act and the core provisions. These are procedural provisions which provide for the control of demolition in conservation areas and the general duties of LPAs with regard to the preservation and enhancement of conservation areas.

Controls relating to outdoor advertising

- 4.71 The TCPA 1990 empowers Ministers to make regulations controlling the display of advertisements. Planning permission is deemed to be granted for advertisements displayed in accordance with the regulations. Where an advertisement is not in accordance with the regulations, express consent is required and a planning application must be submitted to the LPA.
- 4.72 LPAs are responsible for the day-to-day operation of the advertisement control system, and for deciding whether a particular advertisement should be permitted on submission of an application. The LPA is also responsible for the control of enforcement over advertisements, although currently advertisement enforcement exists as a separate procedure to that for mainstream planning. It is also noteworthy that the significant changes to the enforcement of advertisements control that were introduced by the Localism Act 2011 do not apply in Wales.
- 4.73 Some advertisements – such as freestanding billboards – are entirely separate from development subject to mainstream planning control; and there may be little benefit in integrating consent for such displays with planning permission. Others – such as illuminated shop fascias – are intimately connected with development projects, such that there may be benefit in seeking to eliminate overlapping controls.

TOPICS WE PROVISIONALLY REGARD AS OUTSIDE SCOPE

- 4.74 The provisions we refer to below are contained in the main planning Acts and deal with matters related to development and use of land. However, we provisionally consider them not to have a sufficiently close link to the central provisions outlined above to be included in a code dealing with planning and development management. It is our view that these provisions would benefit from

codification or consolidation and in some cases reform, but that they would be better codified elsewhere within the wider programme of work.

Controls relating to trees

- 4.75 Controls relating to trees, in the form of tree preservation orders (“TPOs”), are made and managed by the relevant local planning authority. The aim is to protect trees, largely those of amenity value to local communities, including but not exclusively those under threat from new development. A separate but overlapping system of control, by means of felling licences, is administered by Natural Resources Wales.
- 4.76 Regulatory requirements relating to TPOs in England and Wales used to be spread across primary and secondary legislation, and in the orders themselves. The Government concluded in a 2007 White Paper relating to the planning system in England that it would be helpful to introduce a single set of regulations that would contain all such requirements, applying to all TPOs.³⁹ It accordingly introduced the necessary legislative changes in sections 192 and 193 of the Planning Act 2008, which removed all of the detail relating to TPOs from the TCPA 1990, and enabled such regulations to be made. The relevant changes to the TCPA 1990 were brought into effect in England in April 2012, along with the Town and Country Planning (Tree Preservation) (England) Regulations 2012.⁴⁰
- 4.77 Although the 2007 White Paper related solely to England, the provisions of the PA 2008 relating to TPOs – and the consequential changes to the TCPA 1990 – apply in principle in both England and Wales. However, they have yet to be brought into force in Wales. The unsatisfactory pre-2012 system therefore still applies, with the relevant provisions spread across the TCPA 1990, the Town and Country Planning (Trees) Regulations 1999⁴¹ (which still apply in Wales, although revoked in relation to England), the Town and Country Planning (Trees) (Amendment) (Wales) Regulations 2012 and in the TPOs themselves.
- 4.78 It would of course be possible simply to bring the changes in the Planning Act 2008 into force in Wales, along with new Regulations, which would help to resolve inconsistencies in the existing provisions and produce a more streamlined and fairer system. But the introduction of a new Planning Code would provide an opportunity for a separate codification of tree preservation legislation – and possibly Part II of the Forestry Act 1967 as it applies in Wales – which might be preferable, as it would simplify the planning and development management code, and assist those concerned with trees and forestry in finding all the law they need in one place.

Powers to require land owners to remedy the condition of land

- 4.79 The TCPA 1990 provides a free-standing power for local planning authorities to require landowners to improve the condition of their land in the interest of the general public. This power is not linked to the core planning provisions, and would fit more appropriately with other provisions which are aimed at improving

³⁹ HM Government, *Planning for a Sustainable Future* (2007) paras 9.25 to 9.27, 10.3.

⁴⁰ SI 2012 No 605.

⁴¹ SI 1990 No 1892.

land and regenerating areas more widely, for example provisions in the Housing and Regeneration Act 2008.

Compulsory purchase of land for planning-related purposes

4.80 LPAs and Ministers are provided in the TCPA 1990 with the power to acquire and dispose of land for the purpose of development or in the interest of proper planning.

4.81 The historical development of the law relating to compulsory purchase of land has, however, left the statutory provisions fragmented between different statutes. A number of other Acts enable LPAs to acquire, develop and do various things in order to improve their areas, or provide Ministers with the power to set up bodies or schemes for these purposes. The Law Commission's Final Report, *Towards A Compulsory Purchase Code*, noted that:⁴²

The current law is a patchwork of diverse rules, derived from a variety of statutes and cases and over more than 100 years, which are neither accessible to those affected, nor capable of interpretation save by specialists.

4.82 We consider there to be a range of reasons for the exclusion of compulsory purchase from the first part of the Planning Code, whether or not the Assembly has legislative competence in relation to it.

COMPLEXITY OF THE LAW

4.83 The legislation relevant to compulsory purchase is spread across a number of statutes. The acquisition procedure is found in the Compulsory Purchase Act 1965, the Ancient Monuments and Archaeological Areas Act 1979, the Acquisition of Land Act 1981, the Compulsory Purchase (Vesting Declarations) Act 1985, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Town and Country Planning Act 1990 and the Planning Act 2008. The assessment of compensation is found in the Land Compensation Acts of 1961 and 1973, and the Planning and Compensation Act 1991. There are additional provisions inserted into the above Acts by Pt 8 of the Planning and Compulsory Purchase Act 2004 and Pt 9 of the Localism Act 2011.

4.84 This framework illustrates the interlinked nature of the provisions on compulsory purchase, and the complexity of the subject-matter. The law is in places very old, fragmented and has been extensively amended. It is clear that consolidating the law on compulsory purchase would be a large, complex and time consuming exercise, which is likely to be the reason why there has been no attempt to do so to date, despite recommendations to do so. If the recommended rolling programme of consolidation is undertaken, tackling the law of compulsory purchase would represent, at its most expansive, an opportunity to simplify a broad and complex area of law, and even more narrowly, an opportunity to produce a more focused piece of legislation dealing with the acquisition of land for planning purposes.

⁴² *Towards a Compulsory Purchase Code* (2003) Law Com No 286.

COHERENCE WITH OTHER PROVISIONS

- 4.85 Provisions relating to compulsory purchase are complex and span a number of different Acts. The issues arising as a consequence include:
- (1) Provisions in the TCPA 1990 do not only relate to things done under the TCPA 1990. These provisions also relate to the acquisition of listed buildings in need of repair under the Listed Buildings Act 1990.
 - (2) In addition to the provisions in the TCPA 1990, many other Acts contain provisions relating to the acquisition of land.
 - (3) Many provisions in the TCPA 1990 operate by applying other legislation on the acquisition of land by public bodies, or by modifying or excluding that legislation.
 - (4) Presentation of provisions in the TCPA 1990 is hard to follow. The language used is complex and dense.
- 4.86 Codifying all compulsory purchase provisions in one place would provide an opportunity to deal with the considerable duplication and to present provisions more clearly and coherently.

VIEWS FROM OTHER JURISDICTIONS

- 4.87 The Scottish Law Commission recently concluded consultation on their Discussion Paper on Compulsory Purchase. A key proposal in this paper was the repeal of all current legislation, and the replacement with a new statute.
- 4.88 In Northern Ireland, the compulsory purchase provisions are already outside the Planning Act (Northern Ireland) 2011. The rights to compensation and the methods and procedures for assessing the correct amount are derived from the "Compensation Code". This is made up of Acts of Parliament, case law and established practice. The principal relevant statutes are: Lands Tribunal and Compensation Act (NI) 1964, the Planning and Land Compensation Act (NI) 1971, the Land Acquisition and Compensation (NI) Order 1973, the Land Compensation (NI) Order 1982 and the Planning Blight (Compensation) (NI) Order 1981.

Hazardous Substances

- 4.89 The Hazardous Substances Act 1990 is predominantly concerned with public safety, and sets out a consent procedure to ensure that hazardous substances can be kept or used in significant amounts only after the responsible authorities have had the opportunity to assess the degree of risk arising to persons in the surrounding area, and to the environment.
- 4.90 The responsibility for deciding whether the risk level is tolerable and whether a particular proposal to store or use a hazardous substance should be allowed is one for the local hazardous substances authority. This authority will normally be the same authority which would act as local planning authority in dealing with any related development proposal. The Health and Safety Executive will advise the local planning authority on risk arising from the presence of a hazardous substance. Natural Resources Wales will advise on the risk to the environment.

- 4.91 While there are similarities between the hazardous substances consent process and the mainstream planning consent process, the links are comparatively few. In terms of the similarities, there continues to be a decision made by the local planning authority, and a process to follow for the granting of consent. This process of granting consent might be accommodated within the mainstream planning consent process if there is a will to do so, by the redefinition of a material change of use of land so as to include any increase in the amount of substances stored on that land. There remain, however, significant differences with the mainstream planning consent process in terms of notification and consultation requirements.
- 4.92 In our view while there remains an overlap between the TCPA 1990 and Hazardous Substances Act, this would be more appropriately dealt with by making free standing provisions regarding enforcement or other cross over issues, within the Hazardous Substances legislation.

CONSULTATION QUESTIONS

- 4.93 Consultation question 4-1: We welcome stakeholders' comments on the proposed scope of an initial piece of codified planning law focussing on planning and development management.**
- 4.94 Consultation question 4-2: We welcome stakeholders' views on the subject-matter of later phases of codification and the suggested wider scheme of codification.**

CHAPTER 5

TECHNICAL REFORM

INTRODUCTION

- 5.1 As outlined in Chapter 1, it is our view that a codification exercise should go beyond consolidation and consider reforms which rationalise the substance of the law and improve process and procedure, without introducing any substantial policy change into the law. We categorise any improvements so made as “technical reform”, aimed at improving the clarity, consistency and accessibility of the law.
- 5.2 We recognise that the expression “technical reform” has the potential to be interpreted widely, and cause uncertainty. In this chapter we shall, therefore, attempt to outline the appropriate degree of technical reform to be undertaken as part of this exercise.
- 5.3 In order to set our parameters, we have produced a system of classification for the types of improvement we consider appropriate in the substantive phase of the project. Any improvements which fall outside these parameters should, we provisionally consider, be beyond the scope of the project.
- 5.4 In order to make our classification system as clear as possible, we provide examples of improvements in each category. The examples we use are illustrative, and not intended to exhaustively list the existing deficiencies in the law that fall within each category. Stakeholders are, however, welcome to comment upon those examples and suggest others for consideration.
- 5.5 All topics which form part of the proposed Planning Code will need to be reviewed in order to identify areas where technical improvements might be beneficial. We envisage, however, that those parts of the system that are more frequently used and amended are likely to need closer attention.
- 5.6 This project does not aim to consider issues which might require reform of planning principle or policy. We consider reform only so far as it furthers the broader aim of the project: clearer, simpler and more accessible planning law for Wales. As the project is, by its nature, a technical exercise, the identification of technical improvement or reform flows naturally from this premise.
- 5.7 We consider that the exercise of technical reform provides an opportunity to simplify areas of unnecessary complexity and remove obvious redundancy or duplication. Care must, however, be taken to ensure that necessarily complex provisions are not reduced to high-level statements, and that detail is not removed without proper consideration of the circumstances in which it applies.
- 5.8 In concluding this chapter, we shall seek stakeholders’ views as to whether we have correctly identified the scope of technical reform. Comprehensive reform proposals will be compiled during the substantive phase of the project, following which there will be a formal consultation before any final recommendations are made.

CLASSIFICATION

5.9 We have identified four categories of technical improvement to the current legislative framework:

- (1) clarification where the terms used in statute lack clarity or provisions are inconsistent in their wording;
- (2) procedural improvements where there is a need to streamline procedure or amend discrepancies in the planning process;
- (3) removal or rationalisation of obsolete, duplicative or uncommenced provisions; and
- (4) adaptation where provisions do not reflect established practice.

5.10 In the following sections, we provide further explanation in respect of each category and set out examples of the types of issue which we consider falling within each.

LACK OF DEFINITIONAL CLARITY OR INCONSISTENCY IN WORDING

5.11 There are provisions in the current law that are unclear in their application or inconsistent in their wording. Where we identify such provisions, there is a good provisional case for reform to improve the clarity and accessibility of a new Planning Code. We provide the following examples.

Reserved matters

5.12 Outline planning applications allow for a decision on the general principles of how a site may be developed. They can only be used where permission is sought for the erection of a building (or operational development which is ancillary to that building).

5.13 Reserved matters are those aspects of a proposed development which an applicant can choose not to submit details of with an outline planning application. Those matters which can be reserved are limited exclusively to the following:¹

- (a) access;
- (b) appearance;
- (c) landscaping;
- (d) layout; and
- (e) scale

5.14 Any other condition attached to an outline planning permission which provides for subsequent approval by the local planning authority (“LPA”) does not amount to a reserved matter. This is an important distinction; a reserved matter is treated in a procedurally distinct manner to other matters reserved for subsequent approval,

¹ Town and Country Planning (Development Management Procedure) (Wales) Order 2012 SI 2012 No 801, art 2(1).

both in terms of how the application is made and the applicable timescale.

- 5.15 However, existing legislation, in particular the Town and Country Planning Act 1990 (“TCPA 1990”), does not consistently deal with the distinction between outline planning permission and reserved matters. The TCPA 1990 contains provisions intended to relate to both but drafted with reference only to “planning permission”, which includes outline and full permission, but not reserved matters approvals.
- 5.16 For example, section 92(1) indicates that outline planning permission can be provided for by a development order; however, there is no specific reference to the subsequent phase of approval of a reserved matter. Similarly, section 74(1)(e) allows a development order to require an LPA to give any applicant for any consent, agreement or approval required by a condition imposed on a grant of planning permission notice of their decision on his or her application. Reserved matters are not conditions attached to planning permissions; as a result, there is no provision on which an applicant can rely to require an LPA to determine an application for approval of reserved matters.
- 5.17 There is no case law to assist but it seems that, despite the uncertainty, the law operates in such a manner that applications for approval of reserved matters are treated as applications for planning permission. For example, in the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (“DMPO”),² the power to issue development orders with reserved matters has been assumed. The DMPO includes definitions of “applications for reserved matters” as well as “applications for outline planning permission” and “applications for planning permission”.³
- 5.18 Clearly, however, the ambiguity surrounding the treatment of reserved matters is unsatisfactory, and while the issue does not appear to have caused problems to date, it has the potential to be problematic and should be clarified in the proposed Planning Code.
- 5.19 It is our preliminary view that there is a strong case for making explicit reference to reserved matters, as distinct from references to planning permission, where there is an intention for a provision to apply to such applications. Such a proposal might be particularly timely, given the tacit acknowledgement of the potential problem by the trend in recent legislation to clarify the place of reserved matters. For example, several provisions of the Planning (Wales) Act 2015 (“PWA 2015”), refer to “reserved matters” introducing, for example, specific consultation requirements in respect of an application for approval of reserved matters.⁴

Operational land

- 5.20 Statutory undertakers are bodies authorised by any enactment to carry on one of the undertakings specified in section 262(1) of the TCPA 1990 (primarily

² SI 2012 No 801, as amended by the Town and Country Planning (Development Management Procedure) (Wales) (Amendment) Order 2016 SI 2016 No 59.

³ Town and Country Planning (Development Management Procedure) (Wales) Order 2012 SI 2012 No 801, paras 3 to 5.

⁴ Town and Country Planning Act 1990, s 100A inserted by Planning (Wales) Act 2015, s 37.

transport or transport-related undertakings). Some of the special provisions applying to statutory undertakers relate only to their operational land, as defined in section 263. Section 263(1) defines two categories of operational land: land may be operational if it is used for the purposes of the undertaking concerned, or if an interest is held in it for the purpose of carrying out that undertaking.

- 5.21 According to section 263(2) neither category includes land which “is comparable rather with land in general” than with land used for statutory undertakings. This exclusion appears to be intended to exclude premises such as shops, offices, showrooms and dwelling-houses owned by a statutory undertaker, even if they are used in some way for the undertaking.⁵ The TCPA 1990 attempts to draw a distinction between land held by an undertaking for general purposes or for investment, and land actually used for carrying on the undertaking. In *ex p Warwickshire County Council*, the Divisional Court held that whether the exclusion applies is essentially a question of fact.⁶
- 5.22 It is our preliminary view that clarifying the exclusion in the proposed Planning Code would be beneficial.

Content of an enforcement notice

- 5.23 An LPA has the power under section 172(1) of the TCPA 1990 to issue an enforcement notice where it appears to them that there has been a breach of planning control and that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations. Section 172(2) requires a copy of the enforcement notice to be served on the owner and occupier of the land, and any other person having an interest in the land which, in the opinion of the LPA, is materially affected by the notice.
- 5.24 In accordance with section 173(1) of the TCPA 1990, an enforcement notice must state the matters which appear to the LPA to constitute a breach of planning control. Section 173(3) further states that the notice must specify the steps which the LPA require to be taken, or the activities which the LPA require to cease, in order to achieve, wholly or partially, certain purposes. The wording “wholly or partially” allows an LPA to decide to “under-enforce”, meaning they can require something less than complete remedying of the breach of planning control.
- 5.25 Section 173(4) sets out the “purposes” for which the LPA can require steps or activities in an enforcement notice:
- (1) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
 - (2) remedying any injury to amenity which has been caused by the breach.
- 5.26 In *Oxfordshire CC v Wyatt Bros (Oxford) Ltd*, the Court of Appeal held that an

⁵ *Encyclopaedia of Planning Law and Practice* (vol 2) p 2-3824-2-3825.

⁶ *R v Minister of Fuel and Power, ex p Warwickshire County Council* [1957] 1 WLR 861.

LPA can require steps to be taken for both of the above purposes in one enforcement notice, and thus “or” at the end of section 173(4) should effectively be read as “and/or”.⁷ Given that it is open to the LPA to under-enforce, an LPA may require the breach to be partially remedied coupled with other work to remedy the injury to amenity. There is no requirement for the LPA to indicate which of these two purposes they are relying on when specifying steps they require to be taken.

- 5.27 It is our preliminary view that the wording of section 173(4) should be clarified in the proposed Planning Code.

Considerations to be taken into account in making planning decisions

- 5.28 There are a number of statutory provisions that require regard to be had to various matters when making planning decisions.⁸ There are other duties in primary legislation, which broadly relate to public authorities carrying out functions generally, but also concern to planning functions.⁹ Further duties can be found in secondary legislation.¹⁰
- 5.29 It might be helpful to LPAs and to other users of the system if these existing duties were to be brought as far as possible into one place within the proposed Planning Code, or at least that signpost provisions point to other legislation where they may be found.

AMENDING DISCREPANCIES IN PROCESS AND STREAMLINING PROCEDURE

- 5.30 There are provisions in the current law that have the potential effect of slowing down the operation of the system, producing inconsistencies, anomalies and hindering accessibility for people wanting to take part in the planning process. Such provisions should, in our view, be considered for reform in the substantive phase of the project. We provide the following examples.

Consistency in the grant of planning permission

- 5.31 Section 70(1)(a) of the TCPA 1990 provides LPAs with a general power to grant planning permission either unconditionally or subject to conditions as they see fit. This is expressly made subject to sections 91 and 92, which require that every planning permission or outline planning permission be granted subject to the

⁷ [2012] EWCA Civ 1921, [2013] LLR 50 at [22].

⁸ Town and Country Planning Act 1990, ss 70(2)(a),(c), 70A(1)(b),(4A)(b), 91(2), 92(6), 97(2), 102(1), 172(1), 177(1),(2), sch 9, para 1; Planning (Listed Buildings and Conservation Areas) Act 1990, ss 66(1), 72(1); Planning and Compulsory Purchase Act 2004, s 38(6); Planning (Wales) Act 2015, ss 3, 11, 31.

⁹ National Parks and Access to the Countryside Act 1949, ss 5, 11A(2); Countryside Act 1968, s 11; Crime and Disorder Act 1988, s 17(1); Countryside and Rights of Way Act 2000, s 85(1); Equality Act 2010, s 149(1); Well-being of Future Generations (Wales) Act 2015, s 3; Environment (Wales) Act 2016, s 6.

¹⁰ Conservation of Habitats and Species Regulations 2010 SI 2010 No 490, regs 9(3), 68(3); Waste (England and Wales) Regulations 2011 SI 2010 No 988, regs 18, 20; Promotion of Use of Energy from Renewable Sources Regulations 2011 S 2011 No 243, reg 3; Town and Country Planning (Development Management Procedure) (Wales) Order 2012 SI 2012 No 80, art 21.

condition that the development must begin within a prescribed period.

- 5.32 Section 73(2)(a) of the TCPA 1990 allows LPAs to grant planning permission for development carried out without complying with conditions subject to which the permission was granted. The LPA may either grant a fresh permission, whether subject to different conditions or unconditionally, or decide that the planning permission should be subject to the same conditions as were previously imposed.
- 5.33 The power for an LPA to grant planning permission unconditionally under section 73(2)(a) is, unlike section 70(1)(a), in conflict with sections 91 and 92. It should not be lawful for an LPA to grant planning permission unconditionally under section 73, except where the development has already begun.
- 5.34 It is our preliminary view that the equivalent section 73(2)(a) should also be expressly subject to the equivalent of sections 91 and 92 in the proposed Planning Code.

Minor material amendments

- 5.35 The section 73 procedure in the TCPA 1990 used to vary or remove conditions is currently also invoked to make minor material amendments to planning permission. There is no statutory definition of a “minor material” amendment, but Welsh Government guidance indicates that a minor material change should be restricted to “one whose scale and nature results in a development which is not substantially different from that which has been approved”.¹¹
- 5.36 Section 73 was designed for the variation and removal of conditions; it was never intended for the making of amendments to a permitted development scheme itself. There are, at least, two problematic results of using section 73 for this purpose: first, amendments can only be made to vary or remove conditions attached to the original planning permission; and secondly, a section 73 application is treated as an application for planning permission and requires the relevant procedures to be followed; this will often be disproportionate for a minor material amendment.
- 5.37 The purported rationale for preferring the section 73 application process to a stand-alone procedure was that it did not require new primary legislation and could provide a solution in the short term.¹² In our view, the codification of planning legislation provides an apt opportunity to consider whether section 73 is the best mechanism for minor material amendments.
- 5.38 It is our preliminary view, shared by the Welsh Government’s Independent Advisory Group in its 2014 report,¹³ that improvements might be made by considering whether there should be a self-standing application procedure for minor material amendments, mirroring the section 96A procedure for non-material amendments in order to facilitate the LPA responding in a reasonable

¹¹ Welsh Government, *Positive Planning: proposals to reform the planning system in Wales*, WG20088, para 6.131.

¹² WYG Planning and Design, *Minor material changes to planning permissions: Options study* (July 2009), para 3.49.

¹³ *Towards a Welsh Planning Act: Ensuring the System Delivers* Report to the Welsh Government by the Independent Advisory Group, June 2012, recommendations 75 and 76.

and flexible manner to small changes to an approved scheme.

Concealed breaches of planning control

- 5.39 There are time limits on the LPAs' ability to take enforcement action. Section 171B of the TCPA 1990 provides that an enforcement notice cannot be served after the end of a period of four years beginning with the date on which the operations were substantially completed, and a breach of condition notice cannot be served after the end of a period of ten years beginning with the date of the breach. Once the time limit has expired the development is immune from enforcement action, and a person may apply for a certificate of lawfulness of existing use of development.¹⁴
- 5.40 The statutory language in section 171B appears to be unqualified. This gives rise to a problem where a developer conceals the breach of planning control so that the time limit expires, meaning that the LPA can no longer take enforcement action and the developer is immune from enforcement.
- 5.41 The solution in England is for the LPA to apply to a magistrates' court for a planning enforcement order (a "PEO").¹⁵ Section 171BC provides that a magistrates' court will make a PEO only if:
- (1) the court is satisfied, on the balance of probabilities, that the apparent breach, or any of the matters constituting the apparent breach, has (to any extent) been deliberately concealed by any person or persons; and
 - (2) the court considers it just to make the order having regard to all the circumstances.
- 5.42 An alternative to the PEO procedure is to codify the Supreme Court's approach in *Welwyn Hatfield Council v Secretary of State for Communities and Local Government and Beesley* ("the Beesley principle").¹⁶ In this case, the court held that immunity cannot extend to a person whose behaviour consists of positive deception in matters integral to the planning process which is directly intended to, and does, undermine the regular operation of that process.
- 5.43 It is our preliminary view that improvements might be made by considering the scope and application of each option in relation to concealed breaches to discern which alternative, if either, could best be applied in Wales.

Compliance with requirements

- 5.44 Section 327A of the TCPA 1990¹⁷ demands compliance with requirements as to the form or manner in which the application under the TCPA 1990 is made, or the form or content of any document or other matter which accompanies the

¹⁴ TCPA 1990, s 191.

¹⁵ TCPA 1990, s 171BA, as inserted by Localism Act 2011, s 124.

¹⁶ [2010] UKSC 15, [2011] 2 AC 304 at [20].

¹⁷ Inserted by Planning and Compulsory Purchase Act 2004, s 42(5).

application. An LPA must refuse to entertain an application that fails to comply.¹⁸

- 5.45 This provision may, however, have unintended side-effects.¹⁹ Prior to the statutory provision, the position was governed by *Main v City of Swansea*.²⁰ In this case, the Court of Appeal declined to accept that the validity of a planning permission should hinge on the distinction between serious or minor irregularities, and laid down a more discretionary test requiring regard to be had to all the circumstances, including the nature of the irregularity, the identity of the person applying for relief, the lapse of time and the effect on other parties and the public.
- 5.46 The test in section 327A appears to be absolute, and prevents the LPA from exercising any discretion as to whether the application complies or not. The current strict position does not allow for *de minimis* and inconsequential irregularities.
- 5.47 It is our preliminary view that an improvement might be achieved by considering whether section 327A should accord an LPA some discretion as to whether the requirements have been satisfied.

OBSELETE, DUPLICATIVE AND UNCOMMENCED PROVISIONS

- 5.48 We consider that the retention of provisions should be considered further in the substantive phase of the project, in particular where:
- (1) the provision is uncommenced in Wales, and there is no intention to commence it;
 - (2) the rationale for enacting the provision no longer exists;
 - (3) the provision has not been used for a number of years;
 - (4) duplicative provisions achieve the same purpose;
 - (5) the provision has ceased to serve any purpose; or
 - (6) an alternative practice has replaced the need for the provision.
- 5.49 There is, however, a need to be cautious when considering provisions which are merely infrequently used. Infrequency of use should not detract from the possible continuing utility of a provision in limited circumstances. Some provisions will have been expressly designed to be used infrequently. On the other hand, they may be undergoing a gradual process of obsolescence. There may be no single identifiable event which makes a provision obsolete - parts of the law are simply overtaken by social, political or economic changes. Provisions may remain underused for years before being properly judged obsolete.
- 5.50 We would hope that by identifying, and ultimately repealing obsolete, duplicative or uncommenced provisions, the law will become clearer, especially for those readers who do not have a detailed knowledge of the planning system, and might

¹⁸ Town and Country Planning Act 1990, s 327A(2).

¹⁹ *Encyclopaedia of Planning Law and Practice* (vol 2) p 2-3959.

²⁰ (1985) 49 P&CR 26.

reasonably expect that all provisions within a piece of legislation must mean something. If the size of the legislation can be reduced by removing such provisions, this might also save time and associated cost for those who use it.

- 5.51 We set out examples of provisions which we consider falling within these categories.

Planning Inquiry Commissions

- 5.52 Section 101 of the TCPA 1990 provides for the constitution of a Planning Inquiry Commission, comprising three to five members instead of the customary single inspector, to act as a tribunal at special planning inquiries involving matters of national or regional importance, or novel technical or scientific considerations. The Planning Inquiry Commission was intended to operate by a two-stage process: the first stage involved an investigation into the background of a proposal and evaluation of the relevant evidence; and the second stage consisted of site-specific public inquiry. Section 101(2) set out the matters that may be referred to the Commission, including an application for planning permission which has been called in by the Welsh Ministers and an appeal.²¹
- 5.53 The procedure has never been used and has been subject to criticism. First, the initial investigative stage was bound to lead the Commission to conclusions, even though arguments of principle and policy as well as local issues would arise at the second stage.²² The UK Government criticised the procedure on similar grounds, stating that it is “virtually impossible to distinguish between site specific issues, which need to be considered at an ordinary public local inquiry, and issues of general policy, which can be investigated by means of the first stage of a Planning Inquiry Commission.”²³ Secondly, there are significant delays inherent in the elaborate process and procedures created to deal with large-scale development proposals. The Planning Act 2008 (“PA 2008”) introduced a new development consent system for nationally significant infrastructure projects (“NSIPs”) and set up the Infrastructure Planning Committee (“IPC”) to determine applications for consent to carry out NSIP development. The Localism Act 2011 abolished the IPC and transferred its functions to the Secretary of State.²⁴
- 5.54 Given that no Planning Inquiry Commission has been constituted since the power was created and its function has been overtaken by the procedure in the PA 2008, it is our preliminary view that improvements might be made by considering a provisional proposal for repeal of the Planning Inquiry Commission in the substantive phase of the project.

Urban development corporations

- 5.55 Urban development corporations (UDCs) can be set up to facilitate the regeneration of urban development areas. Part XVI of the Local Government,

²¹ Town and Country Planning Act 1990, s 78.

²² *Encyclopaedia of Planning Law and Practice* (vol 2) p 2-3405.

²³ Department of the Environment, *Planning: Appeals, Call-In and Major Public Inquiries. The Government's Response to the Fifth Report of the Environment Committee* (1986), para 58.

²⁴ Localism Act 2011, s 128.

Planning and Land Act 1980 sets out the powers of the UDCs to acquire, hold, manage, reclaim, and dispose of land, to carry out building and other operations and to provide services and infrastructure. That Act also enabled the UDC to effectively become the LPA for the area in place of any other authority for the purposes of undertaking development control functions.²⁵

- 5.56 In England, a number of UDCs were set up in the 1980s in the major conurbations (including London Docklands, Liverpool Merseyside, Greater Manchester and Sheffield). These UDCs were all given development control functions but have been progressively wound up with planning powers returned to the LPA. More recently new corporations have been created in other areas (including Thurrock and Northamptonshire) which have generally not been designated as LPAs.
- 5.57 The only UDC ever created in Wales was Cardiff Bay Development Corporation. It was also set up in the 1980s, but was not made an LPA; and it was wound up in 2000. There is currently no indication from Welsh Government that any new UDCs would be created for Wales, despite there remaining some non-governmental interest in pursuing their use, for example calls from the Cardiff Capital Region Advisory Board in relation to the delivery of an integrated transport network for South Wales.²⁶
- 5.58 There are also significant problems with UDCs. As unelected bodies they lack democratic accountability and, as a result, face difficulty in garnering support from the communities within which they operate. It appears unlikely that the Welsh Government will delegate planning responsibility to UDCs.
- 5.59 Finally, it is apparent that authorities may be created to deal with regeneration, without the need to be formally designated as a UDC under the TCPA 1990. A recent example is the Olympic Delivery Authority, charged with delivering the public sector obligations (such as the necessary venues and infrastructure) required for the 2012 Games. Under the London Olympic Games and Paralympic Games Act 2006 the Authority was given the same planning powers as a UDC.
- 5.60 In view of the infrequent use of these provisions, scant possibility of their future use and the fact that removal of the power to create UDCs could clarify the range of authorities that have planning functions, it is our preliminary view that the provisions allowing for setting up of UDCs should not be restated in the proposed Planning Code.

Determination of planning applications: dual jurisdiction

- 5.61 If the LPA has not given a decision on a planning application within the statutory eight week period, the applicant has a right to appeal as if the application had been refused (a “deemed refusal”). Rather than lodging an appeal in these circumstances, the applicant may prefer to continue negotiations with the LPA with a view to trying to obtain planning permission; if this is not achieved, the applicant will need to lodge an appeal anyway. This has resulted in a practice

²⁵ Town and Country Planning Act 1990, s 7 and pt III.

²⁶ S Barry, “Urban development corporation needed for Cardiff Capital Region says board member Prof Brian Morgan” (6 October 2014).

called “twin-tracking”, whereby an applicant lodges two identical or very similar applications and, when the eight week period expires without a decision being made, appeals on one application and continues to negotiate on the other.

- 5.62 Section 70B of the TCPA 1990, inserted by section 43 of the PCPA 2004, is designed to discourage twin-tracking. The provision gives the LPA the power to decline to determine a planning application where the determination period for a similar application has not expired, a similar application’s appeal decision has not been issued, or the time within which to appeal a similar application has not expired. The provision is not yet in force in Wales.
- 5.63 Section 78A, inserted by section 50 of the PCPA 2004, encourages the continuation of discussions between the LPA and applicant after a non-determination appeal is submitted, removing the need for twin-tracking. It provides that, if the applicant appeals within a certain time of the expiry of the eight-week period, an “additional period” commences, during which the LPA may issue notice of their decision. If the LPA issues notice refusing permission, the appeal becomes an appeal against the notice rather than against a deemed refusal and the applicant is given the opportunity to review the grounds of appeal. If the LPA grants conditional planning permission, the appeal becomes an appeal against the imposition of planning conditions. In either case, the applicant may withdraw the appeal. Section 78A has been brought into force in Wales,²⁷ with a stipulated four week “additional period”.
- 5.64 With the emphasis on pre-application negotiation and consultation in the PWA 2015, it seems that section 70B may no longer be required. It is our preliminary view that section 70B should not be restated in the proposed Planning Code.

Imposition of conditions

- 5.65 Section 70(1)(a) of the TCPA 1990 enables LPAs granting planning permission to impose such conditions “as they think it”. This power is not as wide as it appears, and has been limited by case law²⁸ and overlaid with guidance in a Welsh Government circular.²⁹
- 5.66 Section 72(1) provides that LPAs may impose conditions:
- (1) for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission; or
 - (2) for requiring the removal of any buildings or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for

²⁷ Planning and Compulsory Purchase Act 2004 (Commencement No 14 and Saving) Order 2015, SI 2015 No 340.

²⁸ See paras 7.73 to 7.75 below.

²⁹ Welsh Government Circular, *The Use of Planning Conditions for Development Management* 016/2014.

the reinstatement of land at the end of that period.

- 5.67 Read together, the two provisions give the impression that there is no power under section 70(1)(a) to impose conditions which are provided for under section 72(1), namely conditions in respect of land under the control of the applicant, and conditions granting permission for a limited time only. However, in *Davenport v Hammersmith and Fulham LBC*, the Divisional Court held that there is a general power under section 70(1)(a) to impose conditions provided for in section 72(1).³⁰ Therefore, it is sensible to conclude that the conditions in section 72(1) are merely examples of the types of conditions that can be imposed under the general power in section 70(1)(a).
- 5.68 In our preliminary view, section 72(1) provides an example of a duplicative provision and improvements might be made by considering its repeal in the substantive phase of the project.

Simplified Planning Zones

- 5.69 Provisions are made in relation to simplified planning zones (“SPZs”) in sections 82 to 87 of the TCPA 1990. SPZs are essentially an extension of the planning regime set up for enterprise zones, insofar as they grant planning permission for certain types of development specified within the SPZ scheme. This means that a developer will know which types of development are permitted, and be able to carry them out without the need for planning permission.
- 5.70 A scheme for an SPZ achieves its effect by granting planning permission for the types of development it specifies, subject to any conditions or limitations attached. Any conforming development started within 10 years of making the scheme does not require a separate planning application.
- 5.71 Development within an SPZ may only proceed within tightly prescribed limits, which are often restrictive and can conflict with other limits of development especially where the zone adjoins a residential area. There are also limits on the areas where an SPZ may be set up. They cannot be set up in national parks or conservation areas, in Areas of Outstanding Natural Beauty, or on land identified as green belt or as a site of special scientific interest under the Wildlife and Countryside Act 1981.
- 5.72 There has been very little use of SPZs since their introduction in 1986. Within England and Wales three SPZs have been designated, none of which are in Wales.
- 5.73 Specific guidance exists in Wales in relation to the use of SPZs, and LPAs have a statutory duty to keep under review whether SPZ schemes are desirable in their area.³¹
- 5.74 In England, Government policy no longer mentions Simplified Planning Zones specifically; however, it does suggest that planning can be simplified in a number of ways, including the use of: Local Development Orders (“LDOs”) to relax

³⁰ *Davenport v Hammersmith and Fulham LBC*, Times Law Reports, 26 April 1999.

³¹ Welsh Government, *Technical Advice Note 3 Simplified Planning Zones* (1996).

planning requirements in particular areas or for particular categories of development; Neighbourhood Development Orders which can be used to grant planning permission for a specific development proposal or classes of development; and Community Right to Build Orders which can be used to allow parish councils and neighbourhood forums, for areas without a parish or town council, to grant planning permission for a specific development proposal or classes of development.

- 5.75 While Neighbourhood Development Orders and Community Right to Build Orders are not planning tools which exist in Wales, the option of making an LDO does exist. Further, as a consequence of amendments introduced by the Planning and Compulsory Purchase Act 2004 the procedure for preparation and adoption of an SPZ is very similar to that for the preparation of an LDO.
- 5.76 An LDO grants planning permission (directly and without a planning application being needed) for whatever form of development the LPA wants to allow. So, for example, an LPA could bring forward an LDO granting planning permission for general industrial buildings meeting certain requirements (e.g. maximum heights) in a certain area. As long as development meets the LDO requirements, it can then proceed without specific planning permission.
- 5.77 The provisions allowing for SPZs might be viewed as duplication given the existence of LDOs as a tool available to LPAs to relax planning regulation for an area in the manner envisaged by an SPZ. In light of this it is our preliminary view that these provisions should not be restated in the proposed Planning Code.

Areas of archaeological importance

- 5.78 Areas of archaeological importance were introduced in Part II of the Ancient Monuments and Archaeological Areas Act 1979. Within such an area, generally in the centre of a historic city, proposed development needs to be specially notified, to enable the investigating authority (in practice, a local archaeological unit) to consider whether it wishes to carry out archaeological investigations.
- 5.79 Five areas were designated in 1984 in England (in Canterbury, Chester, Exeter, Hereford and York) on an experimental basis.³² No areas have ever been designated in Wales.
- 5.80 In practice, the protection given by the designation of an area of archaeological area is not as great as can be achieved by the use of other policy mechanisms (currently under Welsh Office Circular 60/96). The United Kingdom Government has therefore proposed some 20 years ago that Part II of the Act would be repealed at the first appropriate legislative opportunity.³³ The present exercise would be a good opportunity to implement that proposal in Wales.

Rural development boards

- 5.81 Agriculture is generally outside the scope of the planning system. However, some fifty years ago the UK Government devised a system to meet the special problems of the development of rural areas of hills and uplands, and the special

³² House of Commons Environment Committee, *Session 1986-1987* (ref 146) vol 2, p 19.

needs of such areas. Under Part III of the Agriculture Act 1967, the appropriate Minister could establish a rural development board, for any area appearing to be one where those problems or needs exist.

- 5.82 Only one such board was ever established, in 1967 – in the Northern Pennines. A proposal to set up a second board, in mid-Wales, was the subject of much opposition and never materialised; and the Northern Pennines Board was dissolved on the change of government in 1970.³⁴ No use has ever been made of the relevant legislation since then.
- 5.83 It would seem to be sensible to take the present opportunity to repeal Part III of and Schedule 5 to the Act insofar as they apply in Wales.

PROVISIONS NOT REFLECTING ESTABLISHED PRACTICE

- 5.84 We propose in the substantive phase of the project to undertake a comprehensive review of the legislation in order to ensure there are no gaps on the face of the legislation, and identify where we could make improvements in order to reflect better a provision's subsequent interpretation and application. One way in which this can be achieved is through the codification of case law, and this part should thus be read in conjunction with Chapter 7.

Right to appeal the non-determination of a condition attached to a reserved matter approval

- 5.85 Section 78(1) of the TCPA 1990 provides an appeal against the failure to determine reserved matters and the failure to determine subsequent approvals³⁵ attached to an outline consent within a certain period of time. Section 78(1) does not, however, explicitly extend the right of appeal to the non-determination of a condition³⁶ attached to a reserved matters approval.
- 5.86 As was confirmed in *R v Newbury District Council ex p Stevens and Partridge*,³⁷ an LPA has an implied power under section 78 to impose a condition on the grant of approval of a reserved matter, provided that the condition does not derogate from the outline permission already granted. The principle has been later transposed into the Welsh Government Circular 16/14 on the use of planning conditions for development management. In Chapter 7, we discuss the codification of this principle. However, unless it is implicit in section 78(1), there is no right to appeal against a condition attached to a reserved matters approval.
- 5.87 It is our preliminary view that improvements might be made by considering

³³ Department of the Environment, *Protecting the Heritage* (1996), para 4.8.

³⁴ SI 1969/1095, SI 1971/224.

³⁵ Other matters reserved by condition for the subsequent approval of the local planning authority which are not reserved matters.

³⁶ A local planning authority is required to determine an application for approval of a condition within 8 weeks following receipt of the application (or such other longer period as may be agreed between the applicant and the LPA in writing) or 16 weeks in the case of development requiring an environmental impact assessment. If an LPA fails to determine within 8 weeks or the agreed period a right of appeal accrues.

³⁷ [1992] JPL 1057.

whether the same right of appeal should apply to a condition attached to a reserved matters approval as it does to conditions attached to planning permission or the approval of reserved matters themselves.

Appeals under section 288

- 5.88 Section 288(5) of the TCPA 1990 provides that any order or action of the Welsh Ministers to which the section applies can be challenged on the grounds either that it is not within the power of the Act, or that any of the “relevant requirements” have not been complied with. The second ground is qualified by the requirement that the applicant should show substantial prejudice.
- 5.89 The degree of overlap between the two limbs has persuaded the courts that conceptual distinctions should not be drawn between them. Despite the wording of section 288(5), the courts have found a residual discretion not to quash a decision where the applicant was not substantially prejudiced. In *Miller v Weymouth and Melcombe Regis Corp*,³⁸ Kerr J declined to quash a discontinuance order which contained a clerical error because there was no substantial prejudice to the applicant. The general rule remains that the decision should be quashed unless the point is purely technical or there was no possible detriment to the applicant.
- 5.90 It is our preliminary view that improvements might be made by considering whether this section should be re-worded to reflect the overlap between the two grounds of appeal.
- 5.91 More fundamentally, we will consider whether Part XII of the TCPA 1990 (validity) should continue to exist alongside judicial review. The two procedures have converged considerably, particularly in view of recent developments. Rule 54.5(5) of the Civil Procedure Rules³⁹ requires all judicial review challenges under the planning Acts to be brought within six weeks – the same time limit for applications under Part XII. Schedule 16 of the Criminal Justice and Courts Act 2015 amends Part XII to require permission for all High Court challenges. It is also noticeable that there are no specific provisions providing for a right to a High Court challenge in many other statutes regulating other areas of administrative law and procedure; and no provisions equivalent to Part XII in the Planning Act (Northern Ireland) 2011.
- 5.92 In the substantive phase of the project we will give further thought to the differences between the two procedures and evaluate whether there is sufficient reason for Part XII of the TCPA 1990 to exist in parallel with judicial review.

CONCLUSIONS

- 5.93 The inclusion of technical reform as an element of codification provides a unique opportunity to deal with issues which have not been sufficiently problematic to necessitate self-standing reform. Such issues, however, clearly detract from the accessibility and clarity of the law as it currently stands.

³⁸ (1974) 27 P&CR 468.

³⁹ SI 2013/1412.

- 5.94 It is our view that technical reform alongside consolidation provides an opportunity to produce a better piece of legislation than that which it replaces. It provides an opportunity to address anomalies and modernise the system in minor but important respects; we seek views on whether aspects of the system other than those we have mentioned should be improved.
- 5.95 Consultation question 5-1: We invite stakeholders' views on whether technical reform as discussed in this chapter should be pursued in the substantive phase of the project.**
- 5.96 Consultation question 5-2: We invite suggestions from stakeholders as to desirable areas for technical reform which fall within our classification system.**

CHAPTER 6

UNIFYING CONSENT REGIMES

INTRODUCTION

- 6.1 In Chapter 5, we classified the types of technical reform we consider may improve the clarity, consistency and accessibility of the law. The subject of this chapter – unifying consent regimes – falls within that classification system by seeking to streamline procedure and amend discrepancies in the law. It is, however, on the border between technical reform and reform which seeks to effect a change in policy. We think it is worth setting the issue out in more detail here and seeking stakeholders’ views.
- 6.2 While planning consent plays a central role in deciding whether or not a development can go ahead, there are other (sometimes overlapping) statutory consents which must be obtained in addition. The overlap between planning and other statutory consents opens up the possibility of drawing together some of these separate consent regimes and moving towards a more integrated, streamlined model.
- 6.3 Streamlining and simplifying the legislative framework which regulates consents could contribute to administrative efficiency. The extent of legislative reform would need to be determined during the substantive phase of the project, but could range from consolidating provisions relating to separate consent regimes in one place and tidying up discrepancies and anomalies between the different processes, through to merging statutory consents into a single process.
- 6.4 Drawing together certain planning-related consents within the mainstream planning system has the potential to improve transparency and clarity within the system, make the system more coherent and enable members of the local community to take a more rounded and informed view of development proposals. Unification could also make the system operate more smoothly and decision-making more consistent, as the exercise provides an opportunity to eradicate small anomalies and inconsistencies between the different statutory consent regimes which currently exist. For example, the time limits for enforcement action and requirements for notification or publication of a development proposal are, in some cases, different depending on the type of consent. In practice, the most stringent procedural requirement is followed, but a clearer, standardised approach would be beneficial.
- 6.5 Interestingly, a combined consent regime already exists in the Republic of Ireland, where there is no separate system of consent relating to listed buildings, conservation areas, advertisements and scheduled monuments. The controls are integrated into the mainstream planning system; for example, advertising is classified as “development” and accordingly dealt with under mainstream planning legislation.¹
- 6.6 At this stage of the project, we are seeking stakeholders’ views on the drawing together of certain separate statutory consent regimes within the mainstream

¹ Planning and Development Act 2000, ss 2, 3.

planning consent process.

THE CURRENT SYSTEM

- 6.7 Alongside planning consent, there exists a wide array of other statutory consents including those dealing with listed buildings,² scheduled monuments,³ advertising,⁴ conservation areas,⁵ flood defences,⁶ works to trees and hedges,⁷ protected species,⁸ protected sites,⁹ hazardous substances,¹⁰ traffic regulation,¹¹ highways¹² and building regulation.¹³
- 6.8 While these consents may be needed for projects that do not require planning permission, in practice they are often required in addition to planning permission to allow a development to proceed. To illustrate, an application for both planning permission and listed building consent will be required for works to a listed building (where the works would require a planning application if the building was not listed). In addition, an application for planning permission may be required where there are restrictions on the permitted development rights for a listed building (which would otherwise mean that an application for planning permission was not required).
- 6.9 Local planning authorities (“LPAs”) are responsible both for planning decisions and many of the separate consents (such as listed buildings, advertising, conservation areas, works to trees and hedges and hazardous substances). Agencies such as Cadw¹⁴ and Natural Resources Wales¹⁵ are responsible for making consent decisions in respect of certain other consents (such as flood defences, scheduled monuments, forestry and protected species).

PREVIOUS REVIEWS

- 6.10 In England, over the past few decades there have been a number of Government

² Planning (Listed Buildings and Conservation Areas) Act 1990.

³ Ancient Monuments and Archaeological Areas Act 1979.

⁴ Town and Country Planning Act 1990, Town and Country Planning (Control of Advertisements) Regulations 1992.

⁵ Planning (Listed Buildings and Conservation Areas) Act 1990.

⁶ Water Resources Act 1991, Land Drainage Act 1991.

⁷ Town and Country Planning Act 1990, Town and Country Planning (Trees) Regulations 1999, Forestry Act 1967, Hedgerow Regulations 1997.

⁸ Conservation of Habitats and Species Regulations 2010, Wildlife and Countryside Act 1981.

⁹ Wildlife and Countryside Act 1981, Countryside and Rights of Way Act 2000, Conservation of Habitats and Species Regulations 2010.

¹⁰ Planning (Hazardous Substances) Act 1990.

¹¹ Road Traffic Regulation Act 1984.

¹² Highways Act 1980.

¹³ Building Regulations 2010.

¹⁴ Cadw is the Welsh Government’s historic environment service.

¹⁵ Natural Resources Wales is the body formed to largely take over the functions of the Countryside Council for Wales, Forestry Commission Wales and the Environment Agency in Wales, as well as certain Welsh Government functions.

sponsored reports and reviews into the variety of consent regimes which have arisen. Their findings have been remarkably consistent, with each recommending a move towards a unified system of consent. In Wales, a recent consultation on proposals for the historic environment considered the unification of conservation area and planning consent regimes. We briefly outline the conclusions of these reviews below.

6.11 In 2004, the Office of the Deputy Prime Minister sponsored research into the merits of unifying various consent regimes and the options for pursuing such reform of the planning system. The research recognised that unification of consent regimes could be a complex and difficult process. It concluded that focusing on only a limited number of consent regimes would provide a manageable starting point.

6.12 The report proposed an incremental process leading to a unification of the “core” regimes which include planning permission, listed building and conservation area consents. It said:¹⁶

Proceeding to a unified system, either directly or in stages, would lead to benefits for local planning authorities, applicants and other stakeholders including members of the public. Unification of the “core” consents regimes would mean that three separate regimes would be condensed into one single system.

6.13 In the same year, following a 2003 consultation on reforming the heritage protection system, the Department for Culture Media and Sport prepared its report “Review of Heritage Protection: the Way Forward”.¹⁷ It set out a short term package of reforms to the protection regime which would help clarify the listing system. In addition, it proposed a longer term package which would require legislative changes, including an integrated consent regime unifying listed building consent and scheduled monument consent to be administered by LPAs.

6.14 The report acknowledged that combining listed building consent with scheduled monument consent might provide a step towards further unification. It also identified that there might be other steps worth exploring, such as the potential for linking conservation area consent with planning permission.

6.15 The Chancellor and the Deputy Prime Minister commissioned Kate Barker, a business economist, to review planning policy and procedures in order to consider how these might better deliver economic growth and prosperity alongside other sustainable development goals. Her final report, published in 2006,¹⁸ set out a series of recommendations with the aim of ensuring that the planning system better supported economic growth, while maintaining and enhancing delivery of wider objectives, including encouraging community involvement, supporting local democracy and protecting the environment.

¹⁶ Office of the Deputy Prime Minister, *Unification of Consent Regimes* (June 2004) p 317.

¹⁷ Department of Culture, Media and Sport, *Review of Heritage Protection: The Way Forward* (June 2004).

¹⁸ K Barker, *Barker Review of Land Use Planning: Final Report – Recommendations* (December 2006).

6.16 Recommendation 16 proposed that:¹⁹

The Government should formally commit to the gradual unification of the various consent regimes related to planning following the proposed unification of scheduled monuments and listed building consents, and should set out proposals in 2007. One option would be to bring together the heritage and planning consents.

6.17 The report recommended a step-by-step approach to unification. The first step in this process being the bringing together of advertising, heritage²⁰ and planning consents.

6.18 In 2007, a Government White Paper set out detailed proposals for reform in response to the recommendations made in the Barker Report.²¹ It was explained that the Government intended to take steps to unify consent regimes as part of wider proposals for making the planning system more efficient and effective.

6.19 The White Paper concluded that, subject to outstanding consultations, listed building consent and scheduled monument consent should be replaced by a combined heritage asset consent, and that conservation area consent should be merged with planning permission. Following this first set of mergers, it was explained that further consultation would follow on unification of planning related consents, although there are yet to be any further developments.

6.20 The Department for Business, Innovation and Skills commissioned a review of non-planning consents from Adrian Penfold, a planning expert and government advisor; his final report was published in July 2010.²²

6.21 The review highlighted that clarifying the boundary between planning and non-planning consents could be vital in ensuring that real improvements, in terms of changing working practices and simplification of the legislative landscape, were made.

6.22 The review recommended that the Government should simplify the non-planning consents landscape by:

Bringing forward legislation, at the earliest opportunity, to merge conservation area consent with planning permission; and to combine listed building consent and scheduled monument consent into a single historic assets consent, determined by local authorities.

6.23 The Westminster Government's response to the Penfold Review of Non-Planning Consents was published in November 2010.²³ Ministers agreed to merge

¹⁹ Above at p 111.

²⁰ Heritage consents are the heritage specific consents which affect historic buildings and places; the main ones are Listed Building Consent, Conservation Area Consent, and Scheduled Monument Consent.

²¹ HM Government, *Planning for a Sustainable Future* (2007).

²² A Penfold, *Penfold Review of Non-Planning Consents: Final Report* (July 2010).

²³ Department for Business, Innovation & Skills, *Government Response to the Penfold Review of Non-Planning Consents* (November 2010).

conservation area consent with planning permission (but did not at this time pursue the wholesale change to designations in a draft Heritage Protection Bill which had been produced predominantly due to lack of Parliamentary time).

- 6.24 In 2013 a Welsh Government consultation was undertaken to inform the development of a Heritage Bill which had the aim of introducing measures to improve protection and management of the historic environment. The consultation proposed that the conservation area consent process should be streamlined by merging it with planning consent. There was, however, mixed support for the proposed merger and the proposal was not taken forward in the Historic Environment (Wales) Bill.

FURTHER CHANGES

- 6.25 The case for abolishing conservation area consent and merging it with planning permission was strengthened following the Court of Appeal's decision in *R (SAVE Britain's Heritage) v Secretary of State for Communities and Local Government*.²⁴ It was held that the Demolition Direction²⁵ exempting most categories of buildings from the requirement to obtain planning permission for demolition was in breach of the Environmental Impact Assessment Directive, and was consequently invalid. This decision meant that the part of the Demolition Direction – which set out that planning permission was not required for demolition which needed conservation area consent – no longer had effect.²⁶ Such provision had previously ensured there was no duplication of consents, but following the decision, planning permission was also required for demolition alongside conservation area consent.
- 6.26 On 1 October 2013 conservation area consent was abolished in England by the Enterprise and Regulatory Reform Act 2013. It was replaced with a new offence of failing to obtain planning permission for demolition in a conservation area.
- 6.27 The legislative changes required in the abolition of conservation area consent in England were:
- (1) repealing provisions relating to conservation area consent;
 - (2) introducing into planning control the enforcement mechanisms, in particular immediate criminal liability, that had applied to conservation area consent; and
 - (3) removing permitted development rights for demolition of unlisted buildings in conservation areas.
- 6.28 The new combined consent process means that the need to obtain consent from the LPA still remains, but it is no longer necessary to make two applications (one for planning permission and one for conservation area consent).

²⁴ [2011] EWCA Civ 334, [2011] PTSR 1140.

²⁵ Town and Country Planning (Demolition - Description of Buildings) Direction 1995.

²⁶ Town and Country Planning (Demolition - Description of Buildings) Direction 1995, paras 2(1)(a) to (d).

6.29 In addition, England-only changes introduced by the Enterprise and Regulatory Reform Act 2013 more closely aligned listed building consent to planning permission. Such changes included:

- (1) allowing the Secretary of State or the LPA to make Listed Building Consent Orders authorising particular works to the alteration or extension of listed buildings. These will work in a similar way to Development Orders granting permitted development rights under the Town and Country Planning Act 1990 (“TCPA 1990”), so that in relation to works specified in the order it will not be necessary to apply for listed building consent.
- (2) provision for a Certificate of Lawfulness to be issued determining whether works to a listed building can be carried out without listed building consent, in the same manner that a Certificate of Lawfulness may be issued by the LPA in respect of development where no planning permission is required.

6.30 For Wales, the Historic Environment (Wales) Act 2016 introduced amendments which also meant that listed buildings and scheduled monument controls were more closely aligned to planning permission. Such changes included:

- (1) the temporary stop notice and the scheduled monument enforcement notice, which give the Welsh Ministers new powers to take formal action in instances where scheduled monuments have been or are being damaged by unauthorised works or works that do not comply with the conditions attached to a scheduled monument consent.
- (2) a new power for LPAs to issue a temporary stop notice in order to prevent the continuation of unauthorised works that appear to them to adversely affect the special architectural or historical interest of a listed building.

ISSUES OF SCOPE

6.31 The reviews discussed above differ in their determination of the desirable scope of an exercise dealing with unifying separate consent regimes.

6.32 If we are to take this matter forward in the substantive phase of the project, our preliminary view is that the focus should be on those consent regimes most closely connected with planning. It is our view that these are consents which are, like planning consent, required for building and other related operations (such as structural alterations, construction, rebuilding, and demolition), specifically:

- (1) listed building consent;
- (2) conservation area consent; and
- (3) advertisement consent.

6.33 We outline briefly below the key features of the above consents.

Listed building consent

- 6.34 Listed building consent is required for any works to demolish any part of a listed building or to alter or extend it in a way that affects its character as a building of special architectural or historic interest.²⁷ In these circumstances, listed building consent is required irrespective of whether planning permission is also required. Unless the list entry indicates otherwise, the listing status covers the entire building, internal and external, objects fixed to it and sometimes also attached²⁸ and curtilage buildings or other structures.
- 6.35 Undertaking works, or causing works to be undertaken, to a listed building which would affect its character as a building of special historic or architectural interest without first obtaining listed building consent is a criminal offence.²⁹ Consent decisions are made by the LPA following notification and consultation procedures.³⁰

Conservation area consent

- 6.36 LPAs are under a duty to designate as conservation areas any areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance.³¹
- 6.37 Conservation areas enjoy special protection under the law and conservation area consent is required for the demolition of almost all unlisted buildings within them. Only small unlisted buildings and some gates, fences, walls or railings may be demolished without conservation area consent.
- 6.38 Failure to obtain conservation area consent when required is a criminal offence.³² Consent decisions are made by the LPA following notification procedures.³³

Advertisement regulations consent

- 6.39 The provisions relating to the control of outdoor advertising are in a freestanding set of Regulations – the Town and Country Planning (Control of Advertisements) Regulations 1992, which originally applied in both England and Wales, but which have applied only in Wales since 2007.
- 6.40 Many advertisements are outside the scope of the 1992 Regulations. Many are granted deemed consent automatically (subject to numerous restrictions as to size, illumination and other details). A relatively small number require express consent, which must be sought from the LPA.

²⁷ Listed Buildings Act 1990, s 66(1).

²⁸ A structure attached to a building, such as adjoining buildings or walls, will also be covered by the listing if the structure was ancillary to the principal building at the date of listing (or possibly 1 January 1969 for buildings listed before that date).

²⁹ Listed Buildings Act 1990, s 7.

³⁰ Listed Buildings Act 1990, s 15.

³¹ Listed Buildings Act 1990, s 69(3).

³² Listed Buildings Act 1990, s 9.

³³ Listed Buildings Act 1990, s 17.

- 6.41 It is a criminal offence to display an advertisement without consent.³⁴ Where required, consent decisions are made by the LPA.

REFLECTIONS ON SCOPE

- 6.42 The above consents already share a close relationship with the planning process using many similar or identical procedures. These overlaps make rationalisation more practicable and attractive. In addition, local authorities are already responsible for the administration of the three consents in their capacity as LPAs, although they may consult with Cadw as they see fit during the decision making process. We consider that LPAs' unique vantage point across the end-to-end development process means that they are best placed to co-ordinate a range of development consenting activities.
- 6.43 With sufficient protection in place to preserve the special status accorded to the built heritage, it would seem entirely feasible to create a closer link between the above separate consents and planning consent. Such an exercise could improve the operation of procedures and policies, which is beneficial for both operators of the system and its users. In addition, simpler legislation ought to be more accessible for its user, and less prone to loopholes and anomalies. Future amendments should also be easier if legislation were simpler.
- 6.44 Pursuing the unification of these separate consents would bring together the key consents needed for building and other operations (with the exception of consent under Building Regulations and scheduled monument consent with which we deal further below). If the consents were to be merged with planning consent, and their separate provisions brought into one set of provisions, this would result in a single permission being required from the LPA for all building and other operations, thus avoiding the requirement for a developer to submit (and an LPA to review) two applications for consents for a single development – resulting in two sets of drawings, two forms to be completed, two committee reports, two decision notices and (in appropriate cases) two appeals and two enforcement notices.
- 6.45 In principle, all that would be required in order to merge the above consent regimes would be an amendment to the definition of “development” in the 1990 Act so as to include works to a listed building, demolition of a building in a conservation area and advertising. This would have the result that planning permission would automatically be required for those categories of works.
- 6.46 It may be noted that works to a listed building and demolition of a building in a conservation area (and works to a scheduled monument) are already all included in the definition of “development” in the Planning Act 2008.³⁵
- 6.47 Unification of the identified consent regimes does not, however, necessarily need to be by way of merging separate controls within one set of provisions. It would also be possible to improve the legislative framework without merging consents. This would mean, in effect, consolidating those separate consent regimes most closely related to planning in one place. An example of this can be found in the

³⁴ Town and Country Planning (Control of Advertisements) Regulations 1992, reg 27.

³⁵ Planning Act 2008, s 32(3).

Planning Act (Northern Ireland) 2011 (“2011 Act”), which restructured the Northern Ireland planning system. The key reforms made by this Act related to the complete overhaul and redesign of the development plan and development management systems.

- 6.48 Specifically, Part 4 of the 2011 Act on additional planning control draws together various consent regimes. The part is divided into chapters on listed buildings and conservation areas, hazardous substances, trees, review of mineral planning permissions and advertisement controls. The bulk of these re-enact provisions of the Planning (Northern Ireland) Order 1991 and transfer these powers to district councils. Users of this Act are therefore able to find all separate consents associated with building and other operations, within the primary piece of planning legislation for Northern Ireland.
- 6.49 While it would be possible to merge advertisement consent with mainstream planning control – as suggested above and as done in the Republic of Ireland – there are not many occasions when the need for advertisement consent directly overlaps with the need for planning permission. This might, therefore, be a consent regime which is more appropriate for separate consolidation, leaving its controls as a freestanding system. We shall consider this further in the substantive phase of the project.
- 6.50 Unification of the identified consent regimes should result in the simplification of the existing legislative framework. It is clear from earlier reviews into separate statutory consents that “heritage consents” – which include conservation area and listed building consent – are particularly problematic, with uncertainty as to timing for approvals, duplication of roles, poor interaction between the consent regimes, inconsistency between processes and a lack of understanding about the relevant procedure. In our view, the simpler the legislation in this area, the less likely it is to be prone to such problems.
- 6.51 In identifying “heritage consents”, it is necessary to consider the appropriateness of realigning these separate consenting processes with planning legislation rather than heritage legislation. While it is our preliminary view that the consents we identify are sufficiently related to the planning process so as to justify a closer association with it, we recognise that they also fit equally comfortably with wider heritage legislation; the impact on this relationship will need to be considered further in the substantive phase of the project.
- 6.52 Considering “heritage consents” also gives rise to the issue of how to deal with scheduled monument consent. Cadw determines applications for scheduled monument consent under its own decision-making procedures and consults additional heritage bodies where considered appropriate, relying on its specialist heritage resources. If this consent were to be linked with planning permission, as with those identified above, scheduled monument applications would be determined by LPAs. This would be a significant change, requiring justification. In addition, the types of works that are the subject of scheduled monument applications are such that they only rarely overlap with the mainstream planning system; and very few applications are in fact submitted each year for scheduled monument consent. It is, therefore, our preliminary view that merging scheduled monument consent with planning consent would go beyond the scope of technical reform outlined in this project. We would value stakeholders’ views.

THE CASE FOR UNIFICATION

- 6.53 There are two dimensions to the case for unification. First, drawing together or merging certain separate consent regimes should result in efficiency savings and improvements to procedures. Secondly, the simplification of the legislative framework should improve the clarity, accessibility and coherence of the planning system.
- 6.54 The reviews outlined above each concluded that, for England at least, some form of unification of statutory consents would make improvements in terms of efficiency and procedure, and the concept of merging certain consents was generally viewed, to a greater or lesser extent, as desirable. Legislative changes introduced by the Enterprise and Regulatory Reform Act 2013 to merge conservation area consent with planning consent in England reflect these conclusions.
- 6.55 Further, the concept of a regime that pulls together a bundle of related consents in order to facilitate a particular class of development is not a new one. The Transport and Works Act 1992 enables the promoter of guided transport projects, such as those for railways or tramways, to apply for most of the required development consents in a single application and process. The concept was extended to nationally significant infrastructure projects through the creation of Development Consent Orders (“DCOs”) under the Planning Act 2008, which bring together eight separate consents. In both cases, the unified consents are an addition to the existing consents landscape and their scope has been limited to a relatively narrow range of complex projects. The combined approach has, however, provided opportunities for those able to take part, to reduce time the otherwise taken to reach decisions on multiple consents, and cut the associated costs.
- 6.56 As also noted above, case law has resulted in the introduction of an unnecessary duplication in terms of requiring planning permission for demolition alongside conservation area consent, a problem which has not yet been addressed in Wales.
- 6.57 In both England and Wales, there have been further legislative changes introduced which have made amendments to the listed building consent process, more closely aligning it to that of planning permission. There are increasing similarities between the separate consent regimes, with the process of determining applications for listed building consent and conservation area consent closely mirroring that of applications for planning permission.
- 6.58 It should also be noted that the statutory policy test relating to the determination of an application for planning permission for works to a listed building (in section 66 of the Listed Buildings Act) is identical to the test relating to the determination of an application for listed building consent (in section 16 of that Act) – namely, to have special regard to the desirability of preserving the building or its setting or any features of special interest. Similarly, the requirement to pay special attention to the desirability of preserving or enhancing the character or appearance of a conservation area (in section 72 of that Act) applies to applications for planning permission, listed building consent and conservation area consent. And the current policy of the Welsh Government is that it is generally preferable, for both the applicant and the LPA, if related applications for planning permission and

listed building consent (or conservation area consent) are considered concurrently.³⁶

- 6.59 Unsurprisingly, research³⁷ indicates that where two consents are required, in practice, both are either refused or granted – and often subject to the same conditions. We are keen to hear stakeholders' views on the significance of this duplication of procedures.

CONCLUSIONS

- 6.60 The reforms required to merge consent regimes will vary depending on the extent of the exercise undertaken. We recognise, however, that any future changes will need to meet a number of core policy objectives. Clearly progress on this matter would not be possible without the involvement of those currently responsible for managing and preserving built heritage – Cadw, local amenity societies and conservation officers. Our provisional view is that, broadly speaking, reform of the consent regime must achieve the aims listed below.

Maintain current level of protection for historic assets

- 6.61 There will need to be a commitment as part of any reform to the heritage protection system that any changes which are introduced will not dilute the current levels of protection for historic assets. These levels of protections are a matter of policy and outside the scope of our review. Any reforms must maintain the levels of special protection provided by the existing consent regimes.
- 6.62 It seems likely that, even after it has been brought within the mainstream planning consent process, consents in relation to developments with a heritage component will still require specialist input from conservation officers.

Operate effectively alongside systems for the management of the historic environment

- 6.63 The Historic Environment (Wales) Act 2016 promotes the protection and future management of the historic environment in a manner which is designed to enable rather than simply act as a barrier to change and development. Any reforms to the consent process must operate alongside and work with this approach towards the management of the historic environment.

Make the system more accessible

- 6.64 For non-planning professionals, developers and the public, aspects of the current system of planning and planning-related consents can be hard to understand. Any reforms must be able to demonstrate that they are making this system more comprehensible and accessible, rather than adding complexity.

Reduce bureaucracy, make the system more efficient and simplify the legislative framework

³⁶ Draft Planning Policy Wales: Chapter 6, the Historic Environment, March 2016, paras 6.5.12 and 6.5.18 (see also paras 6.5.10 and 6.5.23 of the existing Planning Policy Wales).

³⁷ Research by Alan Williams, at Oxford Brookes University, based on survey of 60 local planning authorities (of which 43 responded).

- 6.65 This project is seeking to simplify the law by removing unnecessary burdens which flow from a piecemeal legislative framework, as well as seeking to improve clarity, efficiency, certainty and accessibility. Thus any reforms to the current consent regimes must be able to demonstrate that they will further these aims, in particular focusing on benefits for those using the planning system.
- 6.66 Consultation question 6-1: We consider that drawing together consents as set out in this chapter is likely to deliver a system that is more open, accessible and consistent. We seek stakeholders' views on the practical benefits which might be derived from the exercise.**
- 6.67 Consultation question 6-2: We seek stakeholders' comments on whether we should be looking at the merging of consent regimes into one statutory process, or instead retaining the separation between the processes but presenting these together in the proposed Planning Code.**
- 6.68 Consultation question 6-3: Do stakeholders consider that any (and if so, which) of the statutory consents identified in this chapter are appropriate for unification?**
- 6.69 Consultation question 6-4: We seek any evidence which stakeholders are able to provide on the number of applications for planning permission which are currently accompanied by applications for listed building, conservation area or advertisement consent.**

CHAPTER 7

CODIFICATION OF CASE LAW

INTRODUCTION

- 7.1 The detail required to understand provisions contained in the Town and Country Planning Act 1990 (“TCPA 1990”) is often found outside primary legislation, in case law and guidance. This necessarily renders the law more complex and difficult to access; individuals, particularly those without legal training, attempting to find the law may not know where to look.
- 7.2 The broad aim of this chapter is to consider the case for codification of case law as part of the wider codification exercise which we described in Chapter 3. We shall consider where codification of case law might be useful in terms of improving the clarity and accessibility of the primary legislative text. We invite stakeholders to tell us whether they agree with our views, and we will use such responses to guide the substantive work in the next phase of the project. It will not, therefore, be until the next phase that we produce provisional proposals setting out definitions, rules or principles from case law which might be codified.
- 7.3 The codification of case law can yield a number of benefits. The exercise can contribute towards producing a more complete formulation of the law in an easily accessible form. The difficulty of extracting propositions of law from case law should not, however, be underestimated. The process has been likened to assembling a puzzle: a number of pieces must be examined closely to find those that fit together to form the full picture.¹
- 7.4 Codifying case law can clarify effects of provisions that are not spelt out: for example, the effect of an invalid planning condition upon the planning permission as a whole;² or the time limit for making an application for statutory review of the Secretary of State’s decision under section 288.³ In this context, case law can provide a specific answer to a point which has no answer on the face of the statute. Codification in these situations could improve the clarity of the legislative text.
- 7.5 The advantages of codification of case law must, however, be weighed against the possible disadvantages. There is a risk that codification may lead to rigidity and inhibit the development of the law. This concern is particularly acute in relation to planning principles established by case law. These principles are invariably evolutionary; they are not intended to be exhaustive or prescriptive in a manner similar to a statutory provision. Further, case law may on examination deal with the application of the law at a level of detail inappropriate in legislation. Codifying case law of this sort risks adding unnecessary text and obfuscating rather than clarifying the underlying legal rule. It follows that the criteria for choosing the case law to be codified should be well thought out and reflect the rationale for codification as part of the wider exercise.

¹ D Svantesson, “Codifying Australia’s Contract Law - Time for a Stocktake in the Common Law Factory” (2008) (20)(2) *Bond Law Review* 92, 98.

² See paras 7.70 to 7.72 below.

³ See para 7.63 to 7.65 below.

- 7.6 In this chapter we identify the different types of case law that supplement the legislative text, and then consider the merits of their codification. The examples given intend to illustrate the types of case law which we identify. Where possible we provide a preliminary view on the desirability of their codification. In our consultation paper we shall produce a complete list of those cases we provisionally consider appropriate for codification.
- 7.7 In producing a list of case law topics in the substantive phase, we shall be guided by a set of criteria for selection, which we anticipate will revolve around:
- (1) how settled the case law is;
 - (2) whether the proposition or principle for which the case law stands is sufficiently clear and precise to enable it to be drafted in the form of a legislative provision; and
 - (3) whether there are exceptions to the proposition or principle or any other substantive reasons for not attempting to draft it in legislative form.
- 7.8 This chapter focuses on examples of case law taken from the field of development management and enforcement, topics at the core of the planning system within which a considerable body of case law has developed. In undertaking further work in the substantive phase of the project, we shall consider all areas identified in Chapter 4 as being within the scope of our initial piece of codified planning legislation.

CLASSIFICATION OF CASE LAW

- 7.9 The types of case law arising from the interpretation of the planning legislation can be broadly categorised as:
- (1) case law interpreting undefined statutory terms;
 - (2) case law establishing principles of planning law; and
 - (3) case law filling in the gaps where there is uncertainty in the scope of the statutory provision.
- 7.10 These categories are not exhaustive and are often overlapping but we use them to provide some order to the mass of case law which exists and to assist in reaching a conclusion as to where codification might be useful. We provide below a range of examples of cases falling within each in order to illustrate what we mean by the categories.

DEFINITIONS

- 7.11 Statutory terms are often left undefined in environmental legislation to preserve flexibility in the application of the law.⁴ In the TCPA 1990, for example, fundamental concepts such as “development” and “material change of use” have been deliberately left as open as possible. The courts have further defined the terms in numerous cases, but the original flexibility has been retained by the

⁴ S Bell, D McGillivray and O Pederson, *Environmental Law* (8th ed 2013) p 101.

courts' insistence that the application of law to the facts of any individual case is a matter for the relevant decision-maker. There is, however, some scope for codifying definitions settled in case law, taking into account the importance of maintaining the discretion granted to the decision-maker.

- 7.12 There may be a case for codifying both exhaustive and non-exhaustive definitions of statutory terms. Exhaustive definitions, as the name implies, declare the complete meaning of a defined term; importantly they displace other ordinary or technical meanings. They are typically used to clarify a vague or ambiguous term or narrow the scope of a word or expression. Non-exhaustive definitions, on the other hand, presuppose rather than displace the ordinary meaning of a term. They are often used to expand the ordinary meaning of a word or expression, deal with borderline applications, illustrate the application of a word or expression by setting out examples or preserve the discretion conferred to a decision-maker.

Exhaustive definitions

Curtilage

- 7.13 Section 55(2)(d) of the TCPA 1990 provides that the use of land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse is not to be taken to involve the development of land for the purposes of the TCPA 1990.
- 7.14 The concept of "curtilage" is not, however, defined in statute and has instead developed in case law. In *Sinclair-Lockhart's Trustees v Central Land Board*, the Court of Session held that:⁵

The ground which is used for the comfortable enjoyment of a house or other building may be regarded in law as being within the curtilage of that house or building and thereby as an integral part of the same although it has not been marked off or enclosed in any way. It is enough that it serves the purpose of the house or building in some necessary or reasonably useful way.

- 7.15 In *Dyer v Dorset County Council*, the Court of Appeal held that, in absence of any definition, "curtilage" bore its restricted and established meaning connoting a small area forming part or parcel with the house or building which it contained or to which it was attached.⁶ The house occupied by the applicant within but on the edge of college grounds was not, as a matter of fact and degree, within the curtilage of any relevant building. Nourse LJ endorsed as "adequate for most present date purposes" the definition of the Oxford English Dictionary:⁷

A small court, yard, garth or piece of land attached to a dwelling house and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling house and its outbuildings.

⁵ 1951 SC 258, 264.

⁶ [1988] QB 346.

⁷ Above at 353.

7.16 In *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)*, the Court of Appeal held that *Dyer*, whilst correct, went further than necessary in expressing the view that the curtilage of a building must always be small, or that the notion of smallness was inherent in the expression.⁸ The curtilage of a substantial listed building, in the context of the Planning (Listed Buildings and Conservation Areas) Act 1990, was likely to extend to what were or had been, in terms of ownership and function, ancillary buildings. Although the term applies in different legislative contexts (e.g. permitted development and the identification of a listed building), curtilage has been interpreted uniformly in the TCPA 1990 and the Planning (Listed Buildings and Conservation Areas) Act 1990 (“Listed Buildings Act”). The implicit result is that the approach remains as stated in *Attorney-General ex rel. Sutcliffe v Calderdale Borough Council*, requiring three factors to be considered: the physical layout of the buildings and their structure; their ownership, past and present; and their use or function, past and present.⁹ The Court of Appeal, in this case, held that a terrace of cottages which had been constructed as mill-workers’ dwellings adjacent to, and linked by a bridge to, a mill was a structure within the curtilage of the mill for the purposes of listed buildings control.

7.17 A similar approach was proposed by Neil Stanley, Lecturer at the University of Leeds. He proposed creating a definition of curtilage based on the identification of key characteristics and factors establishing the extent of the curtilage in any given case. The model definition he advanced was as follows:¹⁰

The curtilage of a building is an area of land, including any objects or structures forming part of the land, which together with the building form an integral whole. In assessing whether the building and the land compromise an integral whole, regard is to be had to the degree in which the building and the land exhibit any or all of the following material factors: geographical relationship, function or use, evidence of demarcation, character of the curtilage, the material time when the curtilage issue is determined, ownership, specific wording of statutory provisions, enclosure, and the nature of the building and the weight to be attributed to any material factor which may vary within the statutory context.

7.18 Our preliminary view is that a definition of curtilage would improve the transparency of the law. We intend to explore this in our forthcoming consultation paper.

7.19 A further issue is the date as at which the extent of the curtilage of a building is to be considered. For the purposes of section 1(5) of the Listed Buildings Act, to determine the extent of a listed building, the focus is to be on the curtilage as it was on the date when the building was first listed – which may be some while

⁸ [2000] 2 PLR 102.

⁹ (1983) 46 P&CR 399

¹⁰ N Stanley, “Curtilage - a pernicious lack of certainty?” (1996) *Conveyancer and Property Lawyer* 352, p 358.

ago.¹¹ However, for the purposes of section 55(2)(d) of the TCPA 1990 and the GDPO, to determine whether a planning application is required for certain categories of development, the focus is to be on the extent of the curtilage at the time the development is carried out. This might usefully be clarified on the face of the new Planning Code.

Engineering operations

- 7.20 The first limb of the definition of development under section 55 of the TCPA 1990 covers operational development, including “building, engineering, mining or other operations”. “Engineering operations” is not defined, except to extend it to include “the formation or laying out of means of access to highways”; and “means of access” covers “any means of access, whether private or public, for vehicles or for foot passengers, and includes a street.”¹²
- 7.21 In *Fayrewood Fish Farms Ltd v Secretary of State for the Environment and Hampshire*, the High Court considered whether the excavation and removal of topsoil for the purpose of extracting underlying gravel constituted an “engineering operation”.¹³
- 7.22 The Deputy Judge took the view that “engineering operations” were “operations of the kind usually undertaken by engineers, that is, operations calling for the skills of an engineer”. This test parallels the extended definition of building operations in section 55(1A) as including “demolition of buildings, rebuilding, structural alterations of or additions to buildings, and *other operations normally undertaken by a person carrying on business as a builder*”.
- 7.23 We envisage consulting during the substantive phase upon the benefits of codifying to produce definition along these lines. The consistency and clarity which a definition could bring must be set against the absence of any indication of real difficulty in the interpretation of the existing provision.
- 7.24 In our preliminary view, the lack of any discernible confusion with regard to understanding “engineering operations” militates towards leaving the definition in case law. Nevertheless, the inclusion of a definition may promote consistency. While “mining operations” is also undefined in section 55 of the TCPA 1990, it is defined in article 1(2) of the General Permitted Development Order 1995 as “the winning and working of minerals in, on, or under land, whether by surface or underground working”. By comparison, “minerals” is exhaustively defined as including “all substances in or under land of a kind ordinarily worked for removal by underground or surface working, except that it does not include peat cut for purposes other than sale”.¹⁴ There may be a case for defining the various types of operations provided for in the legislation, and doing so consistently.

¹¹ *Watts v Secretary of State* [1991] 1 PLR 61 at 72F; *R v Camden, ex p Bellamy* [1992] JPL 255.

¹² TCPA 1990, s 336(1).

¹³ [1984] JPL 267 (David Widdicombe QC).

¹⁴ TCPA 1990, s 336(1).

Non-exhaustive definitions

A “building”

- 7.25 “Building operations”, as mentioned above, is defined in section 55(1A) of the TCPA 1990 as including “demolition of buildings, rebuilding, structural alterations of or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder”. “Building” is also defined in section 336(1) of the TCPA 1990 as including “any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building”. The non-exhaustive definition in statute has been supplemented by a judicial approach to determining the meaning of “building” which points to relevant factors rather than attempting an exhaustive judicial definition.
- 7.26 The courts, in interpreting these provisions, have followed a two-fold inquiry: they first ask whether what has been done has resulted in the erection of a “building”; if so, the court “should want a great deal of persuading that the erection of it had not amounted to a building or other operation”.¹⁵ In *R (Westminster City Council) v Secretary of State for the Environment, Transport and the Regions*, the High Court, following this approach, set aside the Secretary of State’s decision that the stationing of a wooden kiosk at Covent Garden did not require planning permission.¹⁶ Jackson J held that the Secretary of State had erred in focusing on the question of whether the placing of the kiosk was a building operation, instead of on whether the kiosk in its final form was a building.
- 7.27 In *Barvis Ltd v Secretary of State for the Environment*, the Divisional Court identified three factors relevant to the definition of a “building”: size, permanence and physical attachment.¹⁷
- (1) A building would normally be something which was constructed on site, as opposed to being brought already made to the site. A building may nonetheless be on a small scale, but where the operations are quite insignificant, they may be regarded as *de minimis* and outside control.
 - (2) A building, structure or erection normally denotes the making of a physical change of some permanence. In *Skerritts of Nottingham*, the Court of Appeal upheld the inspector’s decision that a marquee erected on a hotel lawn every year for a period of eight months was to be regarded as a building for planning purposes, due to its ample dimensions, its permanent rather than fleeting character and the secure nature of its anchorage.¹⁸
 - (3) A physical attachment to the land is in itself inconclusive, but weighed against other factors it may tilt the balance. In *Cheshire County Council v Woodward*, the Divisional Court declined to disturb a finding that no development had occurred when a wheeled coal hopper and conveyor

¹⁵ *Barvis Ltd v Secretary of State for the Environment* (1971) 22 P&CR 710 (Lord Parker CJ).

¹⁶ [2001] EWHC Admin 270.

¹⁷ (1971) 22 P&CR 710, 716-717.

¹⁸ *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2000] 2 PLR 102.

between 16 and 20 feet high had been brought on to the appeal site.¹⁹ In *Barvis*, on the other hand, the erection of a large scale tower crane running along rails was held to constitute development notwithstanding that it was capable of being dismantled and being erected elsewhere.

- 7.28 In those marginal cases where there remains a question as to whether development may have occurred, case law is extensively referred to in order to establish an answer. In the substantive phase of the project it would, therefore, be necessary to consider the arguments for and against the inclusion of a definition in circumstances where the court still played a role in striking a balance between certain competing factors relevant to the definition. In this example, a balance is required to be struck between features of size, permanence and physical attachment in determining what amounts to a “building”. Given that a non-exhaustive definition of “building” currently exists in statute, it is our preliminary view that it may be appropriate for the approach in *Barvis* to remain in case law.

Material planning considerations

- 7.29 Section 70(2)(c) of the TCPA 1990 requires that, in dealing with an application for planning permission, a local planning authority (“LPA”) must take into account “material considerations”. In *Tesco Stores Ltd v Secretary of State for the Environment*, the House of Lords held that what constitutes a “material consideration” is a matter of law for the court.²⁰ The weight accorded to the material consideration is, however, a matter for the decision-maker, subject to *Wednesbury* unreasonableness. There are two limbs to materiality: first, the LPA must have regard to *all considerations* that are material to the application; and second, to be material they must be *planning* considerations.
- 7.30 Section 31 of the Planning (Wales) Act 2015, inserting section 70(2)(aa) of the TCPA 1990, requires the LPA to have regard to any considerations relating to the use of the Welsh language, so far as material to the application. There is no further guidance offered by the TCPA 1990 as to what constitutes a material planning consideration. The courts have accordingly set the limits of discretion in planning control. The starting point is the wide interpretation adopted by Cooke J in *Stringer v Minister of Housing and Local Government*.²¹

Any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances.

- 7.31 The courts have generally avoided prescribing limits to the statutory discretion accorded to decision-maker, recognising that Parliament intended broad flexibility by adopting a formula cast in open-ended terms. The current wording of section 70(2) may of itself indicate that codification should be approached with caution. There are, nevertheless, clear general principles emerging from the case law. The following non-exhaustive list provides some indication of the factors

¹⁹ [1962] 2 QB 126.

²⁰ [1995] 1 WLR 759.

²¹ [1970] 1 WLR 1281.

considered by the court:

- (1) financial considerations;
- (2) planning policy;
- (3) development plans;
- (4) precedent;
- (5) consistency in decision making;
- (6) the “fall-back position” of the applicant
- (7) amenity issues; and
- (8) Welsh language.

7.32 A key issue in determining the extent to which one might go in codifying a judicial approach to interpreting a statutory term is the level of detail and associated complexity which might thereby be introduced into the legislation. While exhaustive definitions are self-contained, non-exhaustive ones are inconclusive and may raise fresh uncertainties. In dealing with non-exhaustive definitions, it would be necessary to determine a number of guiding matters.

7.33 Firstly, which factors should be included? While it could be explained that the list was non-exhaustive, there would still need to be a decision about the factors which were set out as examples on the face of the legislation. Determining whether a factor is material for planning purposes often requires considering a number of key cases and the application of detailed tests or descriptions. By reference to the criteria set out earlier in this chapter,²² we would need to decide which of these cases should be codified as examples of material considerations.

7.34 Secondly, if a useful list can be drawn up, what degree of definition or further explanation might be required for each factor? For example, it is settled law that financial considerations may be regarded as material to planning decisions. In *R (Sainsbury’s Supermarkets) v Wolverhampton City Council*, the Supreme Court reviewed the existing authorities and derived the following propositions:²³

- (1) Financial viability may be material if it relates to the development.
- (2) Financial dependency of part of a composite development on another part may be a relevant consideration, in the sense that the fact that the proposed development will finance other relevant planning benefits may be material.
- (3) Off-site benefits which are related to, or connected with, the development will be material.
- (4) The question of whether a benefit is material does not raise questions of

²² See para 7.7 above.

²³ [2010] UKSC 20, [2011] 1 AC 437 at [70].

fact and degree, as suggested by Kerr J in *ex p Monahan*. There must be a real connection between the benefits and development.

7.35 In *Health and Safety Executive v Wolverhampton City Council*, the Supreme Court additionally considered that, in granting or refusing planning permission, the cost to the public (if any) of either decision is material.²⁴ Lord Carnwath found that the authority “generally must have regard to the cost, at least to the extent of considering whether the cost is proportionate to the aim achieved, and taking account of any more economic ways of achieving the same objective.”²⁵ We would need to consider whether this detail, supplementing the materiality of financial considerations, would also need to appear on the face of the statute.

7.36 An attempt to codify the factors going to whether a consideration is material would lead to a substantially more detailed piece of legislation. It is our preliminary view is there is scope for improving the accessibility of the law by codifying case law on material considerations, however careful thought would need to be given to whether the result would, in truth, be greater clarity. We consider that this should be explored in the substantive phase of the project.

Conclusion

7.37 We consider that we should only attempt to codify an exhaustive definition where there is settled case law supplying one. Codification of non-exhaustive definitions – or judicial approaches to interpreting particular statutory terms – may be worthwhile where there is uncertainty or confusion in the interpretation of the term, or where there is substantial benefit in providing illustrative examples for the user of planning legislation. We consider that the usefulness of including examples on the face of the legislation will depend on the specific nature of the provision, the legislative context, and the difficulty resulting from the interpretation of the term.

PLANNING LAW PRINCIPLES

7.38 Planning law principles may stipulate a desired outcome when a certain set of facts arise, guide the decision-maker or provide a list of appropriate matters to be considered in making a planning decision. While they are stated in general terms, the principles may be applied to particular cases to promote consistency and uniformity.

7.39 Planning law principles are, by nature, mutable, evolutionary and non-exhaustive. As a consequence, particular care must be taken when selecting cases establishing principles of planning law for codification. Nevertheless, in certain cases, it may be appropriate to encapsulate principles in the new Planning Code. In these cases, the principles have been applied relatively mechanically in a rule-like manner, are subject to limited exception, and are necessary to develop a complete understanding of the planning process. We provide four examples.

Whitley principle

7.40 In *Whitley v Secretary of State for Wales*, planning permission was granted for a

²⁴ [2012] UKSC 34, [2012] 1 WLR 2264.

²⁵ Above at [25].

mineral extraction, subject to a condition that the developer would not commence work until a scheme had been agreed with the local authority or, failing that, the Secretary of State.²⁶ The developers failed to reach agreement with the local authority but, to prevent the permission expiring, commenced work on the site. The local authority served an enforcement notice, which was challenged by the developer. Woolf LJ, reviewing the authorities, held:

It is only necessary to ask a single question: are the operations (in other situations the question would refer to development) permitted by the planning permission read together with its conditions? The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot properly be described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and is thus unlawful.

- 7.41 The *Whitley* principle was restated in *Handoll v Warner, Goodman & Streat*, where the High Court took the view that “works which do not comply with the permission and any conditions to which it is subject do not constitute the implementation or commencement of a planning permission”.²⁷ If this were the whole picture, one might conclude that the Planning Code could usefully contain a clause stating this principle.
- 7.42 Although the *Whitley* principle is of general application, applying to a condition precedent, a commencement condition or a limitation, the courts have recognised limited exceptions to it. In *Agecrest v Gwynedd County Council*, conditions of a planning permission required a number of schemes to be submitted and approved before development could commence.²⁸ The local authority then agreed that development could begin without full compliance with all the conditions. Collins LJ held that the planning authority had a discretion in the way in which it dealt with such conditions and that the work done did amount to the start of the development. In *R v Flintshire County Council, ex p Somerfield Stores*, Carnwath J held that a condition had in substance been complied with where the relevant report had been submitted and approved but the formalities, including a written notice of approval, had not been achieved by the time work began on site.²⁹
- 7.43 In *Leisure Great Britain plc v Isle of Wight CC*, Keene J considered that any exceptions to the *Whitley* principle should be on a clearly identifiable legal basis and not simply because the court considered it unfair on the merits to find that the planning permission had not been commenced.³⁰ The exceptions identified were limited to the following:

- (1) where approval under a condition had subsequently been given so that

²⁶ (1992) 64 P&CR 296.

²⁷ (1995) 70 P&CR 627.

²⁸ [1998] JPL 325.

²⁹ [1998] PLR 336.

³⁰ (2000) 80 P&CR 370.

the work done before the expiry date of the permission was lawful;

- (2) where the local planning authority had agreed that development could commence without full compliance with the condition;
- (3) where the condition has in substance been complied with but the formalities not completed before work started; or
- (4) where an enforcement action in respect of the breach of condition could not be taken because it would be in breach of the local planning authority's public law obligations.

7.44 In *R (Hart Aggregate) v Hartlepool Borough Council*, Sullivan J discovered a further distinction between (a) conditions which prohibited development taking place before certain action had been taken ("true condition precedent"); and (b) conditions which merely required certain matters to be agreed before the commencement of development.³¹ The *Whitley* principle is excluded in the case of (b), where the development has been implemented but there has been a breach of a planning condition against which enforcement action can be taken. The Court of Appeal approved Sullivan J's approach in *Greyfort Properties v Secretary of State for Communities and Local Government*.³²

7.45 The viability of codifying the principle depends on whether future exceptions are envisaged and the workability of codifying the existing exceptions. It is our preliminary view that given the number and scope of qualifications of the *Whitley* principle it may not be possible to codify it satisfactorily.

Approval of reserved matters

7.46 In *Thirkell v Secretary of State for the Environment*, outline permission was granted to build 23 houses on a site.³³ Thirkell applied for the approval of reserved matters. The LPA refused permission upon finding that the proposed rerouting of a bridleway was unsatisfactory. The parties had both, however, accepted that the bridleway would have to be rerouted. The Inspector, on appeal, rejected the layout of the plots, stating that if the bridleways were rerouted, the "delightful rural character" of the area would suffer. Willis J held that the Inspector was not entitled to take into account the urbanisation of the area by the permitted development as a relevant factor in dismissing the appeal, since the urbanisation was an inevitable consequence of the outline planning permission.

7.47 The principle established was that the grant of outline permission constitutes a commitment by the local planning authority to the principle of the development, thus preventing the authority from refusing to approve any reserved matter on grounds which go to the principle of the development.

7.48 It is our preliminary view that this rule is well-established, clear and capable of codification.

³¹ [2005] 2 P&CR 31.

³² [2011] EWCA Civ 908, [2012] JPL 34.

³³ [1978] JPL 844.

Validity of an enforcement notice requiring removal of incidental development

- 7.49 In *Murfitt v Secretary of State for the Environment*, Murfitt extended his agricultural and haulage business to include 15 yards of adjoining land, filled with hardcore.³⁴ Murfitt used the land for the purpose of parking heavy goods vehicles in connection with the haulage business. The LPA served an enforcement notice on the grounds that this was a material change of use. The enforcement notice required him to cease using the site for parking vehicles and to restore the land to its condition before the development had taken place. Murfitt contended that the enforcement notice only concerned the making of a material change of use of the land, and did not include the placing of hardcore on the site. The hardcore, he argued, had been placed on the site more than four years before the service of the notice, exempting him from any requirement of its removal.
- 7.50 The Divisional Court rejected Murfitt's arguments and dismissed the appeal. Stephen Brown J considered that it would "make a nonsense of planning control" if an enforcement notice requiring discontinuance of the use of a site for the parking of heavy goods vehicles should not also require the restoration of the land to its previous condition, that requirement being the removal of the hardcore.
- 7.51 In *Somak Travel v Secretary of State for the Environment*, a travel agency was operating from a premises consisting of a ground floor shop and a maisonette on the first and second floor.³⁵ Somak Travel converted the first and second floor into office space and installed a spiral staircase to connect the ground and first floor. The LPA served an enforcement notice on the grounds that the conversion involved a material change of use. The enforcement notice required them to discontinue the use of the two upper floors as office space and remove the spiral staircase. Somak Travel contended that the Secretary of State had no power to require the removal of the staircase because its construction was permissible without planning permission under section 22(2)(a) of the Town and Country Planning Act 1971. Following *Murfitt*, Stuart-Smith J dismissed the appeal.
- 7.52 The principle established was that an enforcement notice can properly require the undoing of any incidental operational development where it forms an integral part of the development enforced against. This also applies to development which has been carried out as permitted development and operational development which by itself is immune from enforcement action by virtue of the four-year time limit under section 171B of the TCPA 1990. The cases provide a clear answer to a difficult question in planning law: what is to be done about incidental operational development which may be immune from enforcement or not in breach of planning control?
- 7.53 Given the importance of the decisions and the relative clarity with which the principle is expressed, it is our preliminary view that there is scope for considering incorporation in the proposed Planning Code.

Principle of abandonment

- 7.54 In *Hartley v Minister of Housing and Local Government*, Mr Fisher used land for

³⁴ (1980) 40 P&CR 254.

³⁵ (1988) 55 P&CR 250.

the dual purpose of a petrol filling station and for the display and sale of cars.³⁶ Mr Fisher later died, and his widow and her son only carried on the petrol filling station business. The land was disposed to Hartley four years later and the site was used for its initial dual purpose. The LPA served an enforcement notice on Hartley, alleging that the use of the site for the display and sale of cars constituted development without planning permission. The Minister, on appeal, found that the use of the land for that purpose had been abandoned and held that the enforcement notice was valid.

7.55 This conclusion was affirmed by the Court of Appeal. Lord Denning MR considered that it was open to the LPA or Minister to find that a use had been abandoned if the land had remained unused for a considerable time in such circumstances that a reasonable man might conclude that it had been abandoned. The material time for determining abandonment, he added, was when the new use was started. Widgery J further stated that the use could be described as abandoned when it ceased with no intention to be resumed at any particular time.

7.56 The intention of the party concerned has since featured in a number of decisions. In *Hall v Lichfield DC*, for example, a cottage in the green belt had been occupied since 1935, but in 1961 the occupant entered hospital as a voluntary patient, where she remained until her death in 1974.³⁷ The deceased's sister and niece removed the furniture from her house to avoid liability for rates with the intention of returning the property should she recover sufficiently to return to her home. The property was placed on the market shortly following her death. The local authority took the view that planning permission was necessary before the residential use of the property could be resumed. The court granted a declaration that the residential use of the cottage had not been abandoned and that there was an existing right to occupy it for that purpose.

7.57 The intention of the party concerned, whilst relevant, is not decisive. In *Trustees of the Castelly-Mynach Estate v Secretary of State for Wales*, Nolan J considered that, in addition to intention, it was necessary to take into account:³⁸

- (1) the physical condition of the building;
- (2) the period of non-use;
- (3) whether there had been any other intervening use; and
- (4) evidence regarding the owner's intention.

7.58 The principle established was: if the use of land or buildings is temporarily discontinued, the resumption of that use is not development; if the use is permanently discontinued, the revival of the use is development. The test applied is the view taken by a reasonable man with knowledge of all the relevant circumstances.

³⁶ [1970] 1 QB 413.

³⁷ [1979] JPL 246.

³⁸ [1985] JPL 40.

- 7.59 It is our preliminary view that there is scope for further consideration of the approach established by this line of case law in the substantive phase of the project. In particular before reaching any view on the merits of codification, we will need to understand the extent of the uncertainty caused by issues relating to the abandonment of use.

Conclusion

- 7.60 It is our preliminary view that there are rules developed in case law that could be usefully incorporated into the Planning Code. These are ones that are applied consistently, clarify the meaning of legislation and provide guidance on how the decision-making process might be applied to the facts of a particular type of case.
- 7.61 However, for the reasons discussed above, there may be less scope for the codification of principles, due to their complex and often evolutionary nature.

GAP-FILLING WHERE THE SCOPE OF STATUTORY PROVISIONS IS UNCLEAR

- 7.62 Certain ambiguities contained in provisions of the TCPA 1990 have been clarified by case law. Codification in these cases could help to ensure that the text of the statute provides a complete explanation of the relevant planning process, improving the accessibility and clarity of the law. We give three examples.

The time limit for making an application under section 288 of the TCPA 1990

- 7.63 An application to the court under section 288 provides the only means of questioning the validity of a decision made by the Secretary of State. In *Griffiths v Secretary of State for the Environment*, the House of Lords held that time begins to run from the date the Secretary of State takes an irreversible step in relation to the decision, as by typing, signing and dating the decision letter, and not from when it is received by the appellant.³⁹ In *Stainer v Secretary of State for the Environment*, the Deputy Judge added that Christmas Day and bank holidays counted in the calculation of the six week time period within which to make an application.⁴⁰
- 7.64 Given that the High Court cannot extend permission to appeal beyond the six week period, it is crucial that an appellant know the time by which an application under section 288 must be made.
- 7.65 It is our preliminary view that there is significant benefit in codifying these case law rules.

Criteria for the validity of planning conditions

- 7.66 Section 70(1) of the TCPA 1990 provides that an LPA, in granting planning permission, may impose “such conditions as they think fit”. In *Newbury DC v Secretary of State for the Environment*, the House of Lords held that, in order to

³⁹ [1983] 2 AC 51.

⁴⁰ (1993) 65 P&CR 310 (David Widdicombe QC).

be valid, conditions must comply with the following tests:⁴¹

- (1) they must be imposed for a planning purpose and not for an ulterior one;
- (2) they must fairly and reasonably relate to the development permitted; and
- (3) they must not be so unreasonable that no reasonable authority could have imposed them.

7.67 The conditions in *Newbury* have been supplemented by guidance in the Welsh Government Circular 016/2014 on the use of planning conditions for development management. Chapter 3 suggests six tests for the validity of planning conditions. The conditions, in summary, should be:⁴²

- (1) necessary;
- (2) relevant to planning;
- (3) relevant to the development to be permitted;
- (4) enforceable;
- (5) precise; and
- (6) reasonable in all other respects.

7.68 It has been suggested that the Circular, in effect, attempts to amplify and slightly reclassify the legal tests set down in *Newbury*, although the criteria of necessity, enforceability and precision are not in themselves free-standing grounds of validity.⁴³

7.69 Given that the conditions in *Newbury* have been recently incorporated in Welsh guidance and there is a divergence between the Circular and the case law, we preliminarily consider the existing position should be maintained. However, in the substantive phase of the project, we intend to reflect on whether codification may assist in clarifying the scope of the power of an LPA to set conditions under section 70(1).

The effect of an invalid condition

7.70 In *Hall & Co v Shoreham-by-Sea UDC*, a condition which required a company to dedicate a road to the public at the company's expense was held to be invalid.⁴⁴ The LPA argued that, if the condition was void, the whole of the planning permission failed. The Court of Appeal accepted the argument on the grounds that the invalid condition was fundamental to the whole of the planning permission.

⁴¹ [1981] AC 578.

⁴² Welsh Government Circular, *The Use of Planning Conditions for Development Management* 016/2014.

⁴³ V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) para 15.08.

⁴⁴ [1964] 1 WLR 240.

- 7.71 The principle established was that an invalid condition which is incidental or trivial can be severed from the planning permission; invalidity of a condition that is fundamental makes the whole permission void. The trivial / fundamental dichotomy was supported by the House of Lords in *Kent CC v Kingsway Investments (Kent)*, holding that if the invalid condition is unimportant, incidental or merely superimposed on the permission, then the permission might endure; if the invalid condition is part of the structure of the permission, the permission falls with it.⁴⁵
- 7.72 The distinction between types of invalid conditions in their effect on the validity of planning permission should arguably be reflected on the face of the legislation. It is our preliminary view that there is scope for further consideration in the substantive phase of the project, with particular regard to whether the trivial / fundamental dichotomy is sufficiently clear and precise to enable it to be drafted in legislative form.

Conclusion

- 7.73 The process of gap filling by codifying case law is often likely to be rational, straight-forward and non-controversial, as in the case of the rules determining the time at which an application under section 288 must be made or the effect of an invalid condition on the validity of planning permission. It seems to us that this could be a desirable addition to the legislation to help the reader understand the planning process.
- 7.74 There will, however, inevitably be cases which are not so straightforward. The gaps, ambiguities and inconsistencies that the courts address may be the product of competing underlying positions of policy and principle, both of which are operable in different cases and have good arguments in their favour. In this circumstance, we are inclined to maintain the existing position and allow the case law and guidance to develop.

CONCLUSIONS

- 7.75 In the substantive phase of the project, we shall put forward a list of case law propositions that we provisionally propose encapsulating in legislation.
- 7.76 **Consultation question 7-1: We welcome stakeholders' views on the rules being brought into the Planning Code, in particular as regards interpreting undefined statutory terms, the principles of planning law and filling gaps where the scope of statutory provisions is unclear.**
- 7.77 **Consultation question 7-2: We welcome any suggestions of case law which stakeholders consider particularly appropriate for codification.**

⁴⁵ [1971] AC 72.

CHAPTER 8

CONSULTATION QUESTIONS

- 8.1 In this chapter, we set out the consultation questions we ask stakeholders to consider.

CHAPTER 1: INTRODUCTION

- 8.2 Consultation question 1-1: We ask stakeholders to provide us with any available figures, estimates or experience of both monetised and non-monetised costs caused by over-complicated or otherwise defective planning legislation.
- 8.3 Consultation question 1-2: We ask stakeholders to provide us with examples of benefits that could be gained from consolidation and simplification of planning legislation.

CHAPTER 2: CURRENT LAW

- 8.4 There are no consultation questions posed in this chapter.

CHAPTER 3: CASE FOR SIMPLIFICATION

- 8.5 Consultation question 3-1: We consider that there is a strong case for creating a new Planning Code. Do stakeholders agree?
- 8.6 Consultation question 3-2: We ask stakeholders' views on the distribution of provisions between the Planning Code – either in the main body of the legislation or in a Schedule – and secondary legislation made under it.

CHAPTER 4: SCOPE OF THE FIRST PART OF A PLANNING CODE

- 8.7 Consultation question 4-1: We welcome stakeholders' comments on the proposed scope of an initial piece of codified planning law focussing on planning and development management.
- 8.8 Consultation question 4-2: We welcome stakeholders' views on the subject-matter of later phases of codification and the suggested wider scheme of codification.

CHAPTER 5: TECHNICAL REFORM

- 8.9 Consultation question 5-1: We invite stakeholders' views on whether technical reform as discussed in this chapter should be pursued in the substantive phase of the project.
- 8.10 Consultation question 5-2: We invite suggestions from stakeholders as to desirable areas for technical reform which fall within our classification system.

CHAPTER 6: UNIFYING CONSENT REGIMES

- 8.11 Consultation question 6-1: We consider that drawing together consents as set out in this chapter is likely to deliver a system that is more open, accessible and consistent. We seek stakeholders' views on the practical benefits which might be derived from the exercise.

- 8.12 Consultation question 6-2: We seek stakeholders' comments on whether we should be looking at the merging of consent regimes into one statutory process, or instead retaining the separation between the processes but presenting these together in the proposed Planning Code.
- 8.13 Consultation question 6-3: Do stakeholders consider that any (and if so, which) of the statutory consents identified in this chapter are appropriate for unification?
- 8.14 Consultation question 6-4: We seek any evidence which stakeholders are able to provide on the number of applications for planning permission which are currently accompanied by applications for listed building, conservation area or advertisement consent.

CHAPTER 7: CODIFICATION OF CASE LAW

- 8.15 Consultation question 7-1: We welcome stakeholders' views on the rules being brought into the Planning Code, in particular as regards interpreting undefined statutory terms, the principles of planning law and filling gaps where the scope of statutory provisions is unclear.
- 8.16 Consultation question 7-2: We welcome any suggestions of case law which stakeholders consider particularly appropriate for codification.