



**Law
Commission**
Reforming the law

Planning Law in Wales: A Scoping Paper Summary

LCCP228 (Summary)

SCOPING PAPER ON PLANNING LAW IN WALES: SUMMARY

CHAPTER 1: INTRODUCTION

- 1.1 This summary provides a brief outline of the Law Commission’s scoping paper on planning law in Wales and sets out consultation questions for consideration by stakeholders.¹ For a more detailed examination of the issues, reference should be made to our scoping paper which is available in both Welsh and English on our website: <http://www.lawcom.gov.uk/>.
- 1.2 The scoping paper presents our preliminary views on the scope of the project and is intended to gauge the support for the creation of a new Planning Code for Wales. We welcome comments on the issues raised in this paper, as well as on the costs and benefits of our preliminary proposals for the codification and simplification of planning legislation. We will carefully review our current understanding and develop our proposals on the basis of the responses made to the scoping paper.

Background and purpose of the paper

- 1.3 Planning law in Wales is unnecessarily complicated and, in places, difficult to understand. It suffers, first of all, from the problem of fragmentation that it shares with the law in England. The Town and Country Planning Act 1990, alongside two other statutes dealing with listed buildings and conservation areas² and hazardous substances,³ comprises the third consolidation of planning legislation since the introduction of the present system of planning control by the Town and Country Planning Act 1947.
- 1.4 The 1990 legislation has been described as a “remarkable achievement”,⁴ but the clarity of presentation it achieved 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; in some cases, however, it makes separate new provision.⁵ It can be hard to determine whether amendments made to existing legislation apply in Wales, England or England and Wales.
- 1.5 The project was agreed with the Welsh Government 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

¹ The scoping paper is published as Planning Law in Wales Scoping Paper (2016) Law Commission Consultation Paper No 228.

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).

⁵ For example, the Planning Act 2008, introduced a national system of approval for “nationally significant infrastructure projects”

and modernise the law.⁶ We initially examined the way in which the development management process operates in law and practice. Whilst we concluded that the system could benefit from a range of reforms, we did not find that there was a need for further wholesale change in this area. During our review and early consultations, however, stakeholders shared their concerns about the complexity and inaccessibility of the law, and made clear that there was a need for the law to be simplified and modernised. The project was restructured to reflect this need in September 2015.

1.6 The publication of the scoping paper coincides with, and is informed by, our project on the Form and Accessibility of the Law Applicable in Wales.⁷ In that report we recommend a new approach to the codification of 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 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.

1.7 We provisionally consider that the codification of planning legislation in 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, removing ambiguities and obsolete material, modernising language and resolving a variety of minor inconsistencies;
- (3) the simplification of 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 a wider sense described above.

1.8 We envisage this process as the first stage in the eventual production of a

⁶ Twelfth Programme of Law Reform (2014) Law Com No 354.

⁷ Form and Accessibility of the Law Applicable in Wales (2016) Law Com No 366

comprehensive Planning Code for Wales. The legislation relating to planning and land use in Wales is voluminous, consisting of at least 48 separate pieces of legislation.⁸ The scoping paper seeks to identify the key statutes and subject-matter to be brought within the scope of an initial piece of codification, and the need for and extent of technical reform required to produce a better piece of legislation.

- 1.9 This project is structured in three phases. The first stage concerns the scope of the project. The scoping paper sets out our current thinking but its publication is also designed to give stakeholders an opportunity to comment on our provisional views. The second stage will involve the formulation of our substantive proposals as to the shape and content of an initial piece of codified legislation. We will publish a consultation paper, undertake public consultation and then report on our conclusions as to the formulation of that piece of legislation. There will then be a 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

- 1.10 Research and pre-consultation meetings with stakeholders in Wales indicate that there is a real demand for consolidation and technical reform of planning law in Wales. It is our intention to produce a Regulatory Impact Assessment (RIA) during the substantive phase of the project. The RIA will identify both monetised and non-monetised impacts of reform, with the aim of understanding the overall impact of society and wider environment.
- 1.11 The exercise of preparing a new Planning Code will 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 local authorities, 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.
- 1.12 We have, however, identified considerable benefit arising as a consequence of a Planning Code in Wales, for example: improvements in the ability of users to access and interpret the law; efficiency gains in terms of time savings to local authorities, businesses and individuals; reduced professional costs (legal and consultancy fees) incurred by applicants; reduced numbers of enquiries from prospective applicants to the local authority for the clarification of the law; improvements in community participation in the planning process by producing a more accessible text; and wider benefits to the economy and society if development is less likely to be subject to delays.
- 1.13 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 above.

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

⁸ We have identified 48 substantial pieces of primary legislation. See Planning Law in Wales Scoping Paper (2016) Law Commission Consultation Paper No 228, para 4.3.

planning legislation.

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: THE WIDER CONTEXT OF THE PROJECT

- 1.14 This chapter sets out the historical development of Welsh planning law both prior to and since the devolved competence to legislate on town and country planning.⁹ It tracks the evolution of the principal pieces of planning legislation in Wales, and describes the legal framework within which a new Planning Code would fit.
- 1.15 It refers to the series of interconnected Acts recently passed by the National Assembly for Wales: the Planning (Wales) Act 2015, the Well-being of Future Generations (Wales) Act 2015, the Historic Environment (Wales) Act 2016 and the Environment (Wales) Act 2016. Linking these pieces of legislation is a commitment to sustainable development to improve the well-being of Wales now and for future generations.

CHAPTER 3: THE CASE FOR A PLANNING CODE

- 1.16 It is our provisional view that the creation of a Planning Code presents a rare opportunity to address problematic aspects of the current legislative framework.
- 1.17 Codification will create a piece of legislation that is more accessible for the public and easier to use. It is an opportunity to bolster public participation and to prepare a legislative framework focussed on the needs of its users. It also enables the promotion of economic growth by streamlining procedures and removing unnecessary complexity.

Difficulties with the current legislative framework

- 1.18 Planning law in Wales is in need of simplification and consolidation for a number of interconnected reasons: the volume of existing legislation; the complexity of the law, in particular given diverging law and policy in Wales and England; and overall, the consequent inaccessibility of the law.

⁹ Government of Wales Act 2006, pt 4.

- 1.19 Whilst all relevant planning provisions were once contained in a single Town and Country Planning Act, there are now at least 48 substantial pieces of primary legislation relating to land use and development in Wales. Distinct topics are not neatly confined in separate Acts, and the law in relation to connected matters is often spread between several different Acts. Devolution has added a new dimension to an already complex legislative picture, with separate statutory provisions applying in England and Wales. For example, if a provision refers to a local planning authority (“LPA”), it is necessary to look to the interpretation clause to check whether the reference is made to “county or county borough councils”. If not, the provision does not apply in relation to Welsh LPAs.¹⁰ As a consequence, the current legislation is particularly inaccessible for those who are not familiar with the planning system.

Reviewing the balance between primary and secondary legislation

- 1.20 The proposed creation of a Planning Code affords a unique opportunity to review the balance between primary and secondary legislation. We maintain as our starting point 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. However, it is our intention to assess the provisions on a case-by-case basis in the substantive phase of the project.
- 1.21 On one hand, relegating matters of detail to be settled by the executive can help the primary Act to remain simple and clear. Users can get a good grasp of the structure of the law, and then focus on the detail of the parts of the system relevant to their concerns. Moreover, secondary legislation can relieve pressure on the Assembly’s legislative timetable - it is not subject to the same levels of scrutiny as Assembly Acts. This allows a degree of useful dynamism, as it can be revised in light of experience or in order to react to changing circumstances.
- 1.22 On the other hand, a single piece of legislation detailing most or all of the operation of the planning system could help make the system more transparent and improve accessibility. Moreover, any significant provision should, as a matter of principle, be subject to full scrutiny through the Assembly Bill procedure.
- 1.23 There is clearly a balance to be struck in each case, taking into account the importance of scrutiny by the National Assembly, efficient and appropriate use of Assembly or Committee time, the significance of the provision in question, the longevity of the provision, the necessity of flexibility and the impact on user accessibility. In the substantive phase of the project, we will consider the use of secondary legislation in view of the general principles described above and the results of a planned Welsh Government review.

Consultation question 3-1: We consider that there is a strong case for creating a new Planning Code. Do stakeholders agree?

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.

¹⁰ See, for example, Planning and Compulsory Purchase Act 2004, s 37.

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

- 1.24 In order to codify the whole of the law relating to planning, a series of separate codification exercises will need to be carried out. We have sought to identify the scope of an initial phase of the code dealing with planning and development management. In determining the scope of our proposed Planning Code, we have considered a number of factors including: priority and resource, frequency of use, and the division of subject-matter at this stage of codification and the later phases.

Topics we provisionally regard as within scope

- 1.25 We provisionally identify a number of core and ancillary planning provisions as falling within the scope of the first piece of consolidation.
- 1.26 The core parts of planning law 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.
- 1.27 We provisionally consider the topics listed below to be within the scope of the first piece of codification. They are mainly sourced from Parts 3 and 7 of the Town and Country Planning Act 1990 and Part 6 of the Planning and Compulsory Purchase Act 2004 (as amended by the Planning (Wales) Act 2015).
- (1) The purpose of the planning system.
 - (2) The administration of the planning system.
 - (3) The nature of development.
 - (4) The plan making process.
 - (5) The process of seeking planning-permission.
 - (6) Remedies.
 - (7) Enforcement.
- 1.28 We provisionally consider that certain other provisions should be included within the proposed Planning Code to ensure its efficient operation, as they often come into play as a consequence of the operation of the core provisions. These include the following categories of provisions.
- (1) Validity of decisions.
 - (2) Financial provisions.
 - (3) Miscellaneous and general provisions.
 - (4) Development affecting highways.

- (5) Statutory undertakers.
- (6) Crown land.
- (7) Rights to require purchase of land.
- (8) Compensation (including land blighted by development proposals).
- (9) Unification of existing consent regimes (we deal with this further below).

Topics we provisionally consider to be outside scope

1.29 We provisionally consider the following topics to fall outside the scope of this project; whilst they deal with matters related to development and land use, they are not sufficiently linked to the central provisions previously outlined, and would be better codified elsewhere within the wider programme of work.

- (1) Controls relating to trees

We consider that further phases of the Planning Code could provide a more suitable opportunity for a separate codification of tree preservation legislation.

- (2) Powers to require land owners to remedy the condition of land

This would fit more appropriately with other provisions aimed at improving land and regenerating areas more widely, for example provisions in the Housing and Regeneration Act 2008.

- (3) Compulsory purchase of land for planning-related purposes

This is a large topic, and for a variety of reasons we consider that it should be excluded from the first part of the Planning Code.¹¹

- (4) Hazardous substances

The Hazardous Substances Act 1990 is predominantly concerned with public safety.

Phases of codification

1.30 We have also given some thought to what might form the subject-matter of later phases of codification. 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.

- (2) Historic Environment: the Welsh Government have indicated that Cadw¹² may be considering the possibility of an eventual consolidation of historic environment legislation. A codification of this legislation 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.¹³
- (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 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”).

1.31 We recognise 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. This will, for a time, leave the existing statute book in an unsatisfactory state – though, we hope, a progressively less unsatisfactory one as more 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.

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.

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

1.32 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. We categorise such improvements as “technical reform”, aimed at improving the clarity, consistency and accessibility of the law. These reforms are not intended to introduce any substantial policy change into the law. In an attempt to place appropriate boundaries on this exercise we have identified

¹² Cadw is the Welsh Government's historic environment service.

¹³ 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

categories of reform which we consider to be within scope.

Lack of definitional clarity or inconsistency in wording

- 1.33 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.

Example

Operational land

Statutory authorities are bodies authorised by any enactment to carry on one of the undertakings specified in section 262(1) of the TCPA 1990 (primarily transport or transport-related undertakings). Some of the special provisions applying to statutory undertakings relate only to their operational land, as defined in section 263. Section 263(1) defines two categories of operational land: land that 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.

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. 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.¹⁴

It is our preliminary view that this provision has the potential to be problematic and that improvements may be sought by clarifying the exclusion in the proposed Planning Code.

Amending discrepancies in process and streamlining procedure

- 1.34 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.

Example

Consistency in the grant of planning permission

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

¹⁴ *R v Minister of Fuel and Power, ex p Warwickshire County Council* [1957] 1 WLR 861.

granted subject to the condition that the development must begin within a prescribed period.

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 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.

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.

It is our preliminary view that the equivalent to section 73(2)(a) should also be expressly subject to the equivalent of sections 91 and 92 in the proposed Planning Code.

Obsolete, duplicative and uncommenced provisions

- 1.35 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.
- 1.36 We would hope that through 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.

Example

Planning Inquiry Commissions

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.

No Planning Inquiry Commission has been constituted since the power was created and its function has been overtaken by the development consent procedure for nationally significant infrastructure in the Planning Act 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.

Provisions not reflecting established practice

- 1.37 We propose to ensure that the text of a provision reflects the provision's use and interpretation. One way in which this can be achieved is through the codification of case law, and this part of the scoping paper should thus be read in conjunction with Chapter 7.

Example

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

Section 78(1) of the TCPA 1990 provides an appeal against the failure to determine reserved matters and the failure to determine subsequent approvals 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 condition attached to a reserved matters approval.

As was confirmed in *R v Newbury District Council ex p Stevens and Partridge*,¹⁵ 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.

It is our preliminary view that improvements might be made by considering 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.

Conclusions

- 1.38 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.

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.

Consultation question 5-2: We invite suggestions from stakeholders as to desirable areas for technical reform which fall within our classification system.

¹⁵ [1992] JPL 1057.

CHAPTER 6: UNIFYING CONSENT REGIMES

- 1.39 This chapter deals with one example of the technical reform we describe above. We recognise, however, that unifying consent regimes straddles the border between technical reform and reform which seeks to effect a change in policy. As a consequence, we discuss it in some detail.
- 1.40 While planning consent plays a central role in deciding whether or not a development can go ahead, there are other statutory consents which are often required in addition to planning permission to allow a development to proceed. These deal with listed buildings, scheduled monuments, advertising, conservation areas, food defences, works to trees and hedges, protected species, protected sites, hazardous substances, traffic regulation, and building regulation.
- 1.41 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.
- 1.42 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 consent which is sought. In practice, the most stringent procedural requirement is followed to avoid mistake – but a clearer, standardised approach would be beneficial.
- 1.43 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 this constitutes those consents which are required for building and other related operations (such as structural alterations, construction, rebuilding, and demolition) specifically: listed building consent, conservation area consent and advertisement consent. We briefly outline their key features:

(1) Listed building consent

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.¹⁶

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.¹⁷ Consent decisions are made by the LPA following

¹⁶ Listed Buildings Act 1990, s 66(1).

¹⁷ Listed Buildings Act 1990, s 7.

notification and consultation procedures.¹⁸

(2) Conservation area consent

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.¹⁹

Conservation areas enjoy special protection under the law and conservation area consent is required for the demolition of almost all unlisted buildings within them.

Failure to obtain conservation area consent when required is a criminal offence.²⁰ Consent decisions are made by the LPA following notification procedures.²¹

(3) Advertisement consent

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.

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.

It is a criminal offence to display an advertisement without consent.²² Where required, consent decisions are made by the LPA.

1.44 The reforms required to merge consent regimes would vary depending on the extent of the exercise undertaken. We recognise, however, that any future changes would need to meet a number of core policy objectives. Our provisional view is that, broadly speaking, reform of the consent regime must achieve the aims listed below.

(1) Maintain current level of protection for historic assets

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.

(2) Operate effectively alongside systems for the management of the historic

¹⁸ Listed Buildings Act 1990, s 15.

¹⁹ Listed Buildings Act 1990, s 69(3).

²⁰ Listed Buildings Act 1990, s 9.

²¹ Listed Buildings Act 1990, s 17.

²² Town and Country Planning (Control of Advertisements) Regulations 1992, reg 27.

environment

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.

(3) Make the system more accessible

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 to complexity.

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

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.

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.

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.

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?

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: CODIFYING CASE LAW

- 1.45 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. We consider the case for putting case law into statutory form as part of the wider codification exercise.

- 1.46 Doing so can contribute towards producing a more complete formulation of the law in an easily accessible form, and clarify the consequences of provisions that are not spelt out: for example, the effect of an invalid planning condition upon the planning permission as a whole. It can provide a specific answer to a point which has no answer on the face of the statute, improving the clarity of the legislative text. We have categorised the types of case law which we deem, in principle, to be appropriate for codification.

Definitions

- 1.47 Statutory terms are often left undefined. There may be a case for codifying both exhaustive and non-exhaustive definitions of statutory terms. Exhaustive definitions, as their 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, are often used to expand the ordinary meaning of a word or expression, deal with borderline applications or illustrate the application of a word or expression by setting out examples.

Example

Curtilage

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.

The concept of “curtilage” is not, however, defined in statute and has instead developed in case law.²³ There are three factors that can be derived: the physical layout of the buildings and their structure; their ownership, past and present; and their use or function, past and present. Our preliminary view is that a definition of curtilage could improve the transparency of the law.

Planning law principles

- 1.48 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.
- 1.49 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-

²³ *Sinclair-Lockhart's Trustees v Central Land Board* 1951 SC 258, 264; *Dyer v Dorset County Council* [1988] QB 346; *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2000] 2 PLR 102; *Attorney-General ex rel. Sutcliffe v Calderdale Borough Council* (1983) 46 P&CR 399.

like manner, are subject to limited exception, and are necessary to develop a complete understanding of the planning process.

Example

Approval of reserved matters

In *Thirkell v Secretary of State for the Environment*, outline permission was granted to build 23 houses on a site.²⁴ 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.

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.

It is our preliminary view that this rule is well-established, clear and capable of being stated in the Planning Code.

Gap-filling where the scope of statutory provisions is unclear

- 1.50 Certain ambiguities contained in provisions of the TCPA 1990 have been clarified by case law. Putting the clarification into the Code 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.

Example

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

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.²⁵ 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.²⁶

Given that the High Court cannot extend permission to appeal beyond the six

²⁴ [1978] JPL 844.

²⁵ [1983] 2 AC 51.

²⁶ (1993) 65 P&CR 310 (David Widdicombe QC).

week period, it is crucial that an appellant know the time by which an application under section 288 must be made. It is our preliminary view that there is significant benefit in putting these case law rules into the Code.

Conclusions

- 1.51 In the substantive phase of the project, we shall put forward a list of case law propositions that we provisionally propose encapsulating in legislation.

Consultation question 7-1: We welcome stakeholders' views on 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.

Consultation question 7-2: We welcome any suggestions of case law which stakeholders consider particularly appropriate for codification.