Chapter 7: The need for a planning application

INTRODUCTION

7.1 The planning system provides that:

1) planning permission is needed for “development”;¹

2) minor development in certain categories is normally permitted automatically, without the need for an application;²

3) development in any other category needs to be the subject of a planning application – usually to the planning authority, but occasionally to the Welsh Ministers.

7.2 The question of whether any particular proposal needs to be the subject of a planning application ought to be simple to answer. Unfortunately, that is often not the case. As noted in the Consultation Paper, the relevant law is not always entirely straightforward and it has become more complex in recent years.

7.3 In Chapter 7 of the Consultation Paper, we outlined briefly the definition of “development”, currently in section 55(1) of the TCPA 1990. We noted that it had remained broadly unchanged since its first appearance 70 years ago, and put forward no suggestions for reform. However, the remaining provisions of section 55 have been modified on various occasions, to include or to exclude certain matters from the scope of the definition. They have also been the subject of much litigation during that period.

7.4 There have also been various attempts to introduce new means of granting planning permission, or authorising development in other ways. These have largely been unsuccessful in practice.

7.5 We put forward a number of relatively modest changes, designed to clarify the legislation in relation to various specific issues. These were generally supported by those responding to the Consultation Paper, with two exceptions (see Consultation Questions 7-3, 7-12).

BUILDING OPERATIONS

7.6 “Building operations” are defined as including:

1) demolition of buildings;

2) rebuilding;

¹ This broadly includes the carrying out of building, engineering, mining or other operations, and the making of any material change in the use of land.

² Generally referred to as “permitted development”.
3) structural alterations of or additions to buildings; and
4) other operations normally undertaken by a person carrying on business as a builder.³

Demolition

We provisionally proposed that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, section 55(4)(g), should not be restated in the new Bill, but that the same result be achieved by the use of the General Permitted Development Order (“GDPO”) (Consultation Question 7-1).

7.7 As noted above, the TCPA 1990 includes “demolition” within the scope of the works that are defined as “development” within section 55(1). We noted in the Consultation Paper that section 55(2)(g) enables the Welsh Ministers to exclude certain categories of demolition by making a direction.⁴

7.8 The direction under section 55(2)(g) that is currently in force, issued in 1995⁵, was partly quashed by the Court of Appeal.⁶ It now excludes from the definition of development only the following categories of demolition:

1) the demolition of all or part of a gate, fence or wall outside a conservation area; and

2) the demolition of a building of a volume less than 50 cubic metres.

7.9 All other categories of demolition are therefore development, and require planning permission.

7.10 At present, the general permitted development order (“GPDO”) grants permission for almost all demolition – save where the demolition is made necessary by the action or inaction of the owner; or where the works are on such a scale as to require environmental impact assessment. The demolition of a listed building currently requires listed building consent, and the demolition of an unlisted building in a conservation area requires conservation area consent.

7.11 In the Consultation Paper, we suggested that this was an unnecessarily complex legislative scheme, and that the same result could be achieved by simply using the GPDO. That would mean that section 55(2)(g) would not be restated; the present Ministerial direction would be cancelled; the two categories of demolition noted above would therefore be included within the definition of “demolition”; but they would be permitted by the GPDO. It would be possible in the future for Ministers to control particular categories of demolition simply by amending the GPDO from time to time.

³ TCPA 1990, s 55(1A), inserted by Planning and Compensation Act 1991, s 13.
⁴ Following the decision in Cambridge CC v Secretary of State (1992) 64 P&CR 257, CA.
⁵ TCP (Demolition – Description of Buildings) Direction 1995, in Appendix A to Welsh Office Circular 31/95 (Planning Controls over Demolition).
⁶ R (SAVE Britain’s Heritage) v Secretary of State [2011] EWCA Civ 334; see also Planning Controls over Demolition, letter to chief planning officers, 18 April 2011.
7.12 Thirty-seven consultees responded to this suggestion, with 34 in agreement. Huw Williams (Geldards LLP) found the proposed simplification “most welcome”. A further three respondents, whilst also agreeing, made it clear that the new legislation should be clearly drafted. One respondent asked that the demolition of buildings in a particular category be automatically included within the scope of development; but that would be the inevitable outcome of our proposal, and does not require a further change to the law.

Recommendation 7-1.

We recommend that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, section 55(4)(g), should not be restated in the new Bill, but that the same result should be achieved by using the GPDO.

Building operations other than demolition

7.13 As to the erection of a new structure, we noted that the Court of Appeal had suggested that, in considering whether a particular operation is “development” for the purposes of planning legislation, a useful starting point is to ask first whether what has been done has resulted in the creation of a building.\(^7\) We reiterated in the Consultation Paper the view we had expressed in the Scoping Paper, namely that it might be better to leave the approach to interpreting the term “building” to case-law. No consultee disagreed with that approach.

We provisionally proposed that the extent of minor building operations that are not excluded from the definition of development by TCPA 1990, s 55(2)(a) be clarified with a single provision to the effect that the carrying out of any works to increase the internal floor space of a building, whether underground or otherwise, is development (Consultation Question 7-2).

7.14 Where an existing structure is to be altered, section 55(2)(a) excludes from the definition of “development” the carrying out, for the maintenance, improvement or other alteration of any building, of works which affect only the interior of the building, or which do not materially affect the external appearance of the building.

7.15 We noted that this exclusion is critically important in practice, as it takes out of planning control all internal building works and trivial external works. However, it is subject to three exceptions:

1) the carrying out of works for the making good of war damage;\(^8\)

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\(^7\) Barvis Ltd v Secretary of State for the Environment (1971) 22 P&CR 710.

\(^8\) Proviso to TCPA 1990, s 55(2)(a) (originates from TCPA 1947).
2) the carrying out of works begun after 5 December 1968 for the alteration of a building by providing additional space in it underground;\(^9\) and

3) the carrying out of works which have the effect of increasing the floor space of a building by such amount as may be specified in a development order.\(^10\)

7.16 In the Consultation Paper, we noted that the first of those exceptions is no longer required, and could simply be omitted. No-one challenged that view.

7.17 We also suggested that the legislation could be simplified by providing that the carrying out of any works to increase the internal floor space of a building, whether underground or otherwise, is always development. That would leave scope for the GPDO to be amended to provide for cases in which such works should be permitted development. In practice, it would be likely that the present position would be maintained, which could be achieved simply by the GPDO permitting all internal works other than the second and third categories of works referred to in paragraph 7.14 above.

7.18 Of the 32 consultees who responded to this question, 29 agreed. Two disagreed, but on the basis that, as a matter of principle, permission should never, or only rarely, be required for internal works.

7.19 We agree that permission should only rarely be required for internal works – as is the position at present. Our suggestion was merely to adjust the legislative mechanism by which that result is achieved. And it would enable the Welsh Ministers to make a further change to the law to bring within control some other category of internal works, if that should seem to be justified on a policy basis, no doubt following further consultation.

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**Recommendation 7-2.**

We recommend that the extent of minor building operations that are not excluded from the definition of development by TCPA 1990, s 55(2)(a), currently in the proviso to s 55(2)(a) and in s 55(2A) and (2B), should be clarified with a single provision to the effect that the carrying out of any works to increase the internal floor space of a building, whether underground or otherwise, is development.

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**ENGINEERING OPERATIONS**

We suggested that it would be possible to incorporate in the Bill a definition of “engineering operations”, to the effect that they are operations normally supervised by a person carrying on business as an engineer, and include the formation or laying out of means of access to a highway, and the placing or assembly of any tank in any

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\(^9\) Proviso to TCPA 1990, s 55(2)(a) (originates from TCPA 1968).

\(^10\) TCPA 1990, s 55(2A),(2B), inserted by PCPA 2004, s.49; the restriction currently applies to works begun after 22 June 2015 which have the effect of increasing the floor space by more than 200 sq m, in circumstances where that the building is used for the retail sale of goods other than hot food (TCP (Development Management Procedure) (Wales) Order 2012, art 2A).
part of any inland waters for the purpose of fish farming there (Consultation Question 7-3).

7.20 The phrase “engineering operations” is not defined in the Act, save to note that it includes

1) “the formation or laying out of means of access to a highway”;\(^{11}\) and

2) “the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there”.\(^ {12}\)

7.21 The Courts have suggested (in Fayrewood Farms v Secretary of State\(^ {13}\)) that an engineering operation could be an operation that would generally be supervised by an engineer (including a traffic engineer as well as a civil engineer) – which echoes the definition in the Act of a building operation.

7.22 We noted both in the Scoping Paper and in the Consultation Paper that that the lack of any discernible confusion with regard to understanding engineering operations militates towards leaving the definition in case law, and that here too a UK-wide definition would be desirable. However, we suggested that it would be possible to combine the three elements highlighted in the previous paragraph into a single definition, which might clarify the existing position without amending the substance of the law significantly. We invited the views of consultees.\(^ {14}\)

7.23 Of 36 consultees who responded to this question, four agreed with the suggested approach. 18 submitted equivocal responses, generally highlighting categories of development, currently considered to be engineering operations, that would be inadvertently excluded – notably works that are often carried out or supervised by persons other than engineers. And 14 disagreed that the phrase should be defined in the Act.

7.24 We had sought to resolve the problem of works supervised by non-engineers through the use of the word “normally”, by analogy with the definition of “building operations” in section 55(1A)(4) (see above). However, we recognise that the suggested definition might confuse rather than assist; and there seems to be no particularly satisfactory alternative on offer. We therefore do not make any recommendation in this regard.

**Recommendation 7-3.**

We recommend that the Bill should not include a definition of “engineering operations”.

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CHANGES OF USE

General principles

7.25 The second limb of “development” is the making of any material change in the use of any buildings or other land. We noted in the Consultation Paper that this leads to significantly more uncertainty, and consequentially litigation, than operational development.15

7.26 We also noted that there are a number of terms and concepts that could in theory be defined, notably “planning unit”.16 The Law Society, in its response to the Consultation Paper, noted that it is no longer correct to categorise as always development any material change in the use of “any buildings or other land” (especially as “building” is defined to include part of a building). It is more accurate to describe development as a material change in the use of any planning unit. However, the assessment of what is the correct unit to consider in any particular case will inevitably be a matter of fact and degree.17 Although the courts do from time to time provide helpful guidance on how this is to be done, we did not consider that it would be either appropriate or helpful – or even possible – to seek to translate such guidance into a concise statutory formula.

7.27 The same applied to the determination of the primary and ancillary uses of a particular planning unit, and to the concept of intensification of use – both of which have also been the subject of a great deal of judge-made law that is almost inevitably specific to the facts of particular cases. Here too, we did not suggest seeking to encapsulate the principles from case law within the wording of the Bill.18

7.28 Those who responded to the Consultation Paper agreed that our approach was correct in principle; and no-one put forward a definition of any of the relevant terms.

7.29 More generally, the Act contains no definition of “material change of use” itself, and the nature of the relevant litigation over the last 70 years suggests that no general definition is realistically possible.19 But the Act does specifically include some matters, and exclude others. We made some suggestions in relation to those provisions.

Use classes regulations

We provisionally proposed that there should be an explicit provision as to the approval of use classes regulations by the negative resolution procedure (Consultation Question 7-4).

7.30 Firstly, we noted The Use Classes Order – made under section 55(2)(f) of the TCPA 1990 – is an extremely useful tool, to eliminate the need for the planning system to

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16 Consultation Paper, para 7.35.
17 Burdle v Secretary of State [1972] 3 All ER 240, per Bridge J at p 244.
18 Consultation Paper, para 7.36.
19 There is a definition in reg. 5 of the Building Regulations 2010; but that would not be appropriate in the present context.
be involved in relation to changes of use that are likely to be of no consequence in planning terms. The Order prescribes certain classes of uses which are considered to be broadly similar in their characteristics and the Act then provides that a change from one use in a particular class to another use in the same class is not a material change of use, even if it otherwise would be.

7.31 However, whilst section 333(4) of the TCPA 1990 provides that an order under section 55(2)(f) providing for use classes (as with a development order) is to be a statutory instrument, section 333(5)(b) omits such an order from the list of those that are to be made by the negative procedure. The present exercise is a useful opportunity for this omission to be rectified. In addition, in line with our general approach to secondary legislation, we suggested that the new power refers to use classes regulations, rather than to an order.

7.32 All 26 consultees who responded to this suggestion were in support. We recommend accordingly.

**Recommendation 7-4.**

We recommend that the Planning Bill should provide for the approval of use classes regulations by the negative resolution procedure.

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**Change of use involving a change in the number of dwellings**

We provisionally proposed that section 55(3)(a) be clarified by providing that the use as one or more dwellings of any building previously used as a different number of dwellings shall be taken to involve a material change in the use of the building and of each part of it which is so used (Consultation Question 7-5).

7.33 Section 55(3)(a) of the TCPA 1990 makes it clear that a subdivision of one residential unit into two – either one house to two flats or one flat to two smaller flats – is a "material change of use", regardless of whether it might otherwise be considered as such. But it is not clear whether a change in the other direction – two flats to one house, or two small flats to one larger flat – is also a material change of use. Nor is it clear whether carrying out of an internal refurbishment scheme to change the use of a building from, for example, five flats to seven (or seven flats to five) would necessarily amount to a material change in the use of the building as a whole, or of any part of it.

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21 The negative procedure provides that, after the Welsh Ministers have exercised their power to make subordinate legislation, they must lay the subordinate legislation before the Assembly. The Assembly then has a period of 40 days to object to it. If the Assembly does not object, then it continues to have effect. If the Assembly does object, then the subordinate legislation is annulled and nothing further can be done under it. Most subordinate legislation made by the Welsh Ministers follow this procedure.
7.34 The courts have held that such a change may be material, depending on its planning consequences. In practice, however, that seems to be confusing the question of whether a particular change is desirable, as a matter of policy, with the prior question of whether permission is required; it thus leads to considerable uncertainty on the part of applicants.

7.35 We accordingly suggested in the Consultation Paper that it would remove uncertainty to make it plain that any change in the number of residential units in a building – up or down – should be considered to be a material change in the use of the building, and thus development.

7.36 Of 36 consultees who responded to this question, 30 agreed with our suggestion; three of those suggested that a change from flats to a single dwelling should normally be permitted development. And three asked whether the same approach should also apply to a change in the number of bedrooms in hotels, hostels and self-catering accommodation.

7.37 Six consultees disagreed, largely on the basis that a decrease in the number of residential units in a building should rarely if ever cause a problem, and should not be subject to planning control.

7.38 We agree that such a change would only rarely need to be the subject of planning control. However, just as an increase in the number of units in a building can cause parking and other environmental problems, so in certain areas a decrease in the number of units may cause a loss of affordable small housing units, which may be of concern to planning authorities. It is true that the areas where this has been a problem have so far been largely the more affluent parts of London; but the same problem could in due course arise in residential suburbs in Wales.

7.39 If our proposed change to primary legislation were to be implemented, we would imagine that, at least initially, the GPDO would be amended so as to grant planning permission for any decrease in the number of units in a building. That would maintain the current position in law. But it would leave open the possibility of the Welsh Ministers at a future date requiring permission to be obtained for such changes, or some of them, within certain areas, as seems appropriate at the time.

**Recommendation 7-5.**

We recommend that section 55(3)(a) of the TCPA 1990 should be clarified by providing that the use as one or more dwellings of any building previously used as a different number of dwellings is a material change in the use of the building and of each part of it that is so used.

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23 Including Kensington & Chelsea and Richmond-upon-Thames.
Other changes of use that are not material

We provisionally proposed that section 55(2)(d) to (f) of the TCPA 1990 be clarified by providing that certain changes of use should be taken for the purposes of the Act not to involve development of the land, rather than the new uses themselves (Consultation Question 7-6).

7.40 Section 55(2)(d) to (f) of the TCPA 1990 provides that certain uses of land are not to be taken to involve development of land – use for purposes ancillary to a dwelling; use for agriculture or forestry; and use for another use in the same use class. We noted in the Consultation Paper that the present exercise is an opportunity to clarify that the focus of enquiry should be on whether a particular change of use is material, and thus development, rather than on the resulting use itself.

7.41 This is a purely technical change. Not surprisingly, all of the 31 responses to this question raised no objection. We therefore propose to carry it forward as a recommendation.

Recommendation 7-6.

We recommend that section 55(2)(d) to (f) should be clarified by providing that the following changes of use should be taken for the purposes of this Act not to involve development of the land:

1. the change of use of land within the curtilage of a dwelling to use for any purpose incidental to the enjoyment of the dwelling as such;

2. the change of use of any land to use for the purposes of agriculture or forestry (including afforestation) and the change of use for any of those purposes of any building occupied together with land so used;

3. in the case of buildings or other land which are used for a use within any class specified in regulations made by the Welsh Ministers under this section, the change of use of the buildings or other land or, subject to the provisions of the regulations, of any part of the buildings or the other land, from that use to any other use within the same class.

WAYS IN WHICH PLANNING PERMISSION MAY BE GRANTED

We provisionally proposed that section 58 of the TCPA 1990 (ways in which planning permission may be granted) should not be restated in the new Planning Bill in its present form (Consultation Question 7-7).

7.42 “Development”, as defined by section 55, covers everything from massive development projects to small domestic extensions; and planning permission will be required for all of them. The Planning Acts have therefore always provided for permission to be granted in a number of ways, so that in many cases no application has to be submitted – thus saving time and money for all concerned.
Section 58(1) of the TCPA 1990 thus provides that planning permission can be granted in five specific ways. And section 90 provides that permission can be deemed to be granted for development benefitting from government authorisation.\(^{24}\)

We noted in the Consultation Paper that section 58 is entirely declaratory and non-exhaustive;\(^{25}\) there are many other ways in which planning permission may be granted or deemed to be granted.\(^{26}\) It does not seem to serve any useful purpose, and is indeed somewhat misleading in its present form. We accordingly suggested that it is not restated in the new Bill — although we acknowledge that the Bill may include “signpost” provisions summarising other provisions in it.

Twenty-five consultees responded to this proposal. All supported it, with the exception of Keith Bush QC, who observed that, if the Code is to be comprehensive, it should include a provision that fully lists the means of obtaining planning permission.

We have some sympathy for Keith Bush QC’s position. And we consider that, if there is to be in the Bill what appears to be a list of ways to obtain planning permission, it should be comprehensive. However, apparently comprehensive lists all too often inadvertently omit particular items; and a provision in primary legislation is difficult to amend. We therefore remain of the view that it is not appropriate to include such a list in the Bill.

But it might be appropriate for the Development Management Manual to include such a list, perhaps with a brief note on the significance of each of the procedures referred to. That could then be updated and amended from time to time, as appropriate.

**Recommendation 7-7.**

We recommend that section 58 of the TCPA 1990 (ways in which planning permission may be granted) should not be restated in the new Planning Bill in its present form, but that a comprehensive list, regularly updated as required, should be included in guidance.

\(^{24}\) TCPA 1990, s 58(2).

\(^{25}\) As is acknowledged in s 58(3) of the TCPA 1990.

\(^{26}\) Others include permission granted by a discontinuance order (under TCPA 1990, ss 102 or 104), in response to a purchase notice (TCPA 1990, s 141(2) or Listed Buildings Act, s 35(5)), in response to enforcement action (TCPA 1990, ss 173(11),(12), s 177), in response to an application for a lawful development certificate (TCPA 1990, s 196), or by Act of Parliament; and permission deemed to be granted for development authorised by a Government department (TCPA 1990, s 90) and for advertising (TCPA 1990, s 222) (see Consultation Paper, para 14.5). Permission may also be granted by mayoral development orders (TCPA 1990, s 61DA) and neighbourhood development orders (s 61J), but only in England.
PERMISSION GRANTED BY DEVELOPMENT ORDER

7.48 We noted in the Consultation Paper that it might seem to be desirable to exclude certain categories of operation – and indeed changes of use – from the scope of “development”, and thus from the need for planning permission, but we suggested that this would be better achieved by their inclusion within the categories of permitted development (development permitted by the GPDO), rather than by further amendments to primary legislation.\(^\text{27}\) No respondent to the Consultation Paper disagreed with that general approach.

7.49 We observed that the production of the new Planning Code will be a useful opportunity to bring together the provisions as to the grant of permission by a general development order – sections 59(2)(a), (3), 60 and 61D(1),(2) of the TCPA 1990. But we recommended no change to the substance of those provisions.

7.50 We also observed that it seems likely that local development orders (LDOs) – which are still of relatively recent origin – may be more successful than the previous similar initiative from central Government, simplified planning zones (see below). We accordingly recommended no changes, although here too the production of a new Code is an opportunity for the relevant provisions in primary development – sections 61A to 61C and 61D(1),(3) and Schedule 4A of the TCPA 1990 – to be consolidated as a set of more easily understandable provisions regulating the procedure.

7.51 No-one has suggested any changes to these provisions.

*We provisionally proposed that section 61 of the TCPA 1990 (largely relating to the applicability of pre-1947 legislation) should not be restated in the new Planning Bill (Consultation Question 7-8).*

7.52 In the Consultation Paper, we noted that section 61(1) of the TCPA 1990 – enabling a general development order to apply differently in different areas – is no longer required, as it is now duplicated by section 333(4B).

7.53 Subsections (2) and (3) of section 61 enable a development order to provide for the way in which pre-1947 legislation is to be applied. They are of no longer of any continuing utility, as they duplicate other provisions and are no longer relied upon by planning authorities. As such, neither of the two general development orders currently applying in Wales\(^\text{28}\) contain any provisions relying on section 61(2) or 61(3).

7.54 30 consultees responded to this question; all were in favour, albeit with two consultees expressing a slight note of caution. Huw Evans expressed support for the proposal in principle, but both warned that the removal of the provisions should not negatively impact any associated or related legislation. We do not consider that removing the provision, which has no practical utility or effect, will do so, and therefore continue to recommend that section 61 should not be restated in the new Bill.

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\(^{27}\) Consultation Paper, para 7.65.

\(^{28}\) The GPDO 1995 and the TCP(DMP)(W)O 2012.
Recommendation 7-8.
We recommend that section 61 of the TCPA 1990 (largely relating to the applicability of pre-1947 legislation) should not be restated in the new Planning Bill.

OTHER FORMS OF PLANNING PERMISSION

Enterprise zones

We provisionally propose that sections 88 and 89 of the TCPA (planning permission granted by enterprise zone scheme) should not be restated in the new Planning Bill (Consultation Question 7-9).

7.55 Planning permission can be granted by an enterprise zone scheme, under the Local Government, Planning and Land Act 1980. A scheme under that Act lasts ten years. No enterprise zone (EZ) has been created under this procedure in Wales since 1985.\(^29\) A similar result could be achieved by the use of a local development order (LDO).

7.56 In Chapter 16, we recommend that the provisions of the 1980 Act, and associated provisions under planning and related legislation, should no longer apply to Wales.\(^30\) It would follow that sections 88 and 89 of the TCPA 1990, providing for planning permission for development in enterprise zones, need not be restated in the new Bill.

7.57 34 consultees responded to our question. Almost all agreed, although Accessible Retail suggested that it might be desirable to retain the EZ procedure for possible use in the future. And three authorities in West Wales, whilst noting that the LDO procedure could achieve the same outcome, also questioned whether the EZ procedure should be retained as an alternative.

7.58 It is of course always possible to retain unused legislation on the grounds that it might be used in the future. However, no-one has drawn attention to any beneficial outcomes that can only be achieved through the use of the EZ procedure. We remain of the view that it is highly likely that any new policy initiative to encourage development will either use the LDO procedure, or will introduce new legislation. We therefore still recommend that the EZ provisions should not be restated.

Recommendation 7-9.
We recommend that sections 88 and 89 of the TCPA (planning permission granted by enterprise zone scheme) should not be restated in the new Planning Bill.

\(^29\) The eight zones that currently exist in Wales were created under a different procedure, in the Finance Act 2012 (see paras 16.75, 16.79).

\(^30\) See paras 16.71 to 16.80.
Simplified planning zones

We provisionally proposed that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill (Consultation Question 7-10).

7.59 Simplified planning zones (SPZs) were introduced by Part 2 of and Schedule 6 to the Housing and Planning Act 1986. An SPZ scheme grants planning permission for development within the categories specified in it. Every planning authority is to keep under review the question of whether a scheme would be desirable for any part or parts of its area, and to prepare schemes accordingly.31

7.60 Notwithstanding that strongly-phrased duty, and the existence of Government guidance in Wales,32 it appears that in the 31 years since 1986, only three simplified planning zones have ever been created in England, two in Scotland, and one in Wales.33 That is possibly because, as we noted in the Scoping Paper, there were significant limitations in practice on the setting up of such zones. And a planning authority can now achieve the same end by making a local development order, which is subject to fewer restrictions (as noted earlier).

7.61 Over the last twenty years, no further guidance has been produced in Wales; and all relevant guidance in England has been cancelled. It therefore seems extremely unlikely that simplified planning zones will ever be used. We accordingly suggested that the relevant statutory provisions (sections 82 to 87 of and Schedule 7 to the TCPA 1990) should no longer apply in Wales.34

7.62 Of 34 consultees responding to this suggestion, all but two agreed. Accessible Retail opposed it, for the reasons noted above in relation to EZ schemes; and one authority suggested retaining SPZ procedures for flexibility.

7.63 For the same reasons as outlined above in relation to Enterprise Zones, we recommend that the power to designate SPZs be abolished.

Recommendation 7-10.

We recommend that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill.

31 See now TCPA 1990, s 83; PCPA 2004. S 45 has been prospectively repealed s 83, but s 45 has not yet been brought into force.

32 TAN 3, Simplified Planning Zones, 1996. There is now no guidance on simplified planning zones in England.

33 It is difficult to be certain as to precise figures; the existence of one in Wales (in Flint; long since expired) only emerged during the present consultation exercise.

34 Consultation Paper, paras 7.76 to 7.79.
APPLICATIONS FOR CERTIFICATES OF LAWFULNESS

We provisionally proposed that the provisions relating to time limits and certificates of lawfulness, currently included in TCPA 1990, sections 171B and 191 to 196, be included in the new Planning Bill alongside the other provisions relating to the need for planning permission – drafted along the lines of TCPA 1990, s 64(1) (Consultation Question 7-11).

7.64 As we noted in the Consultation Paper, in view of the complexity of the primary and secondary legislation, including the ever more elaborate rules as to permitted development, it is not surprising that it is sometimes far from clear whether planning permission (or, under the present system, listed building consent) is required for a particular project – and whether, if permission is required, it is granted by a development order.35

7.65 There is a procedure by which it is possible to obtain a legally binding certificate to the effect that planning permission is or is not required – a certificate of lawfulness of existing use or development (CLEUD) or a certificate of lawfulness of proposed use or development (CLOPUD) as appropriate. The provisions as to applications for certificates of lawfulness are currently located within the enforcement provisions of TCPA 1990 (as sections 191 to 196). They were introduced into the TCPA 1990 by the Planning and Compensation Act 1991, which was an Act dealing principally with enforcement.

7.66 Prior to that there was a procedure, under section 64 of the TCPA 1990, whereby anyone could ascertain whether planning permission would be required for proposed works.

7.67 We indicated that, as a matter of principle, anyone should be able to ascertain whether an operation or change of use (either one that has already occurred or one that is proposed) requires planning permission, entirely independently of any possible enforcement action.36

7.68 We therefore suggested that the production of the Planning Bill is an opportunity to include provisions equivalent to sections 191 to 196 of the TCPA 1990 alongside those referred to earlier in this Chapter, along the lines of the old section 64(1) (including a reference to local development orders but not to enterprise zones or simplified planning zone schemes) – rather than within the part of the Bill dealing with enforcement.

7.69 At present, sections 191 to 196 are drafted by reference to enforcement action; but it might be better to restructure them so that the starting point is to define what is a “lawful operation” and “lawful use” – as was achieved by the old section 64(1). This would not change the substance of the law, but would change the emphasis.

35 Consultation Paper, paras 7.4 to 7.13.

36 Presumably if a CLEUD is not forthcoming, it will be up to the applicant to decide whether to seek retrospective planning permission, and up to the planning authority to decide whether to take enforcement action. But they may both decide to take no further action, and let the matter rest.
7.70 The TCPA 1990 also includes (in section 171B) provisions about the time after which enforcement action cannot be taken – generally either four years or ten years. Those provisions are closely linked to those relating to certificates, and should be included at the same point as them.

7.71 Further, in view of the increasing use being made of granting permission by development order, it is the need for an application that is in many cases more complex to determine than whether a proposed project is development. It was helpful that the original section 64(1)(b) referred to the need for an application; and unfortunate that this provision was lost in the 1991 amendments. The present exercise provides an opportunity for it to be reintroduced.

7.72 30 consultees responded to this question; all agreed; the Law Society, for example, indicated that the change of emphasis would be welcome. We remain of that view.

Recommendation 7-11.

We recommend that the provisions relating to time limits and certificates of lawfulness, currently included in TCPA 1990, ss 171B and 191 to 196, should be included in the new Planning Bill alongside the other provisions relating to the need for planning permission. They should be drafted along the lines of TCPA 1990, s 64(1) (including a reference to the need for a planning application to be submitted, in the light of general and local development orders, but not to enterprise zone or simplified planning zone schemes).

Planning application deemed to include an application for a certificate of lawfulness

We provisionally proposed that a provision be included to the effect that an application for planning permission for an operation or change of use should be assumed to include an application for a CLOPUD; and that an application for planning permission to retain an operation or change of use already carried out without permission be assumed to include an application for a CLEUD (Consultation Question 7-12).

7.73 We noted in the Consultation Paper that landowners and others – particularly risk-averse householders and small builders – sometimes apply for planning permission for projects that are not development, or that are permitted by a development order. It used to be considered (in line with the decision of the majority of the Court of Appeal in Wells v Ministry of Housing and Local Government) that:

Unless a written application for a determination is made, then there is, of course, no duty on the planning authority to make any such determination. But in a planning application there must be taken to be an implied invitation to the planning authority to determine, if they are of that opinion, that planning permission is not required.37

37 [1967] 1 WLR 1000, CA, per Davies LJ at p 1010.
We suggested that it would be possible for a provision to be introduced whereby an application for permission is automatically deemed to include an application for a certificate – thus in effect making statutory the rule in *Wells*.\(^{38}\)

Forty-two consultees responded to this suggestion – the highest number to any of the questions in this Chapter. Eighteen agreed; twenty disagreed; four were equivocal. We have accordingly reconsidered this suggestion carefully.

Those who agreed with our suggestion did so largely on the basis that it would be “a pragmatic approach to regularising development without consent”.

However, those disagreeing pointed out, firstly, that the issues to be determined in response to an application for a certificate of lawfulness are quite different from those falling to be considered in response to an application for planning permission.

The need for permission is straightforwardly a matter of law and fact. For example, a proposal to construct an extension at the rear of a house is clearly a building operation, and thus “development” requiring permission. It may or not be permitted by the GPDO, depending on its dimensions, its location, its proximity to the boundary of the property, whether or not it is in a conservation area, and a range of other factors. On the other hand, matters such as whether the materials to be used match those of the main house, or whether the size of the extension matches others nearby, are irrelevant. The question whether permission is needed is answered regardless of the merit of the proposed development. On the other hand, whether permission, if required, should be granted is a matter of policy.

Torfaen CBC summarised the problem as follows:

> The two applications are completely different – one is fact-based, and the other merit-based. They should not be confused...However, there could be non-legislative guidance advising LPAs that, in circumstances where it is obvious at the outset that a development may be lawful, then they may advise an applicant to withdraw their planning application and submit an LDC application instead.

This point was made by Russell LJ, in his dissenting judgment in *Wells*.\(^{39}\) And more recently, the House of Lords (in *R (Reprotech (Pebsham) Ltd v East Sussex CC)*) doubted the conclusion of the majority in *Wells*, Lord Hoffmann observing that the observations of Russell LJ were “very powerful”.\(^{40}\)

Secondly, a number of consultees pointed out that the evidence required to support an application for a certificate may be very different from the evidence to support a planning application. To take the example of the domestic extension, referred to above, an application for a certificate of lawfulness may require evidence as to the history of the property, previous permissions granted, and enforcement notices issued; an application for planning permission will need to be accompanied by

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\(^{38}\) Consultation Paper, para 7.94.

\(^{39}\) [1967] 1 WLR 1000, CA, per Russell LJ at p 1011.

\(^{40}\) [2003] 1 WLR 348, HL, at [30].
photographs, drawings, and a statement of design and access. The two applications may of course overlap, but they will be quite distinct.

7.82 Section 64(2) of the TCPA 1990 used to provide that “An application under subsection (1) [for a certificate] may be made either as part of an application for planning permission or without any such application.” But that begs the question of what is meant by “part of” a planning application.

7.83 On reflection, we consider that the concerns raised were reasonable, and we therefore do not make any proposal as to legislative change. In short, we have come to the view that it would be unduly onerous to require an applicant for permission routinely to provide, in addition, evidence relating to the lawfulness of the development or proposed development. On the other hand, our suggested new provision would achieve little without it.

7.84 However, it could be helpful for guidance to applicants to emphasise that, in cases where there is doubt as to the need for a planning application, they may be well-advised to submit both an application for a certificate and an application for permission. And guidance to authorities should emphasise that an applicant for a certificate should be advised at the earliest possible opportunity if it seems likely that an application for permission will be required, so that it can be submitted without further ado; and conversely an applicant for permission should be advised as soon as it becomes apparent that an application for a certificate would be more appropriate.

**Recommendation 7-12.**

We recommend that the Bill should not include a provision to the effect that an application for planning permission should be assumed to include an application for a CLOPUD or a CLEUD; but that Welsh Government guidance should remind planning authorities to consider, when validating applications, whether planning permission is actually required for the proposal in question and, if it is, whether it is granted by a development order.