Law Commission
Reforming the law
Comisiwn y Gyfraith
Diwygio'r gyfraith

Planning Law in Wales:

Responses to Consultation Paper

December 2018

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Introduction

1.1 The Law Commission was invited by the Welsh Government to consider the codification of planning law in Wales, and to make recommendations for technical reforms. We published a Consultation Paper in November 2017, containing over 180 provisional proposals and consultation questions.[1] We then carried out a programme of meetings and events over the following three months; and we received over 160 written responses. We are grateful to all those who accepted our invitation to comment.

1.2 This document contains the full text of all of the responses we received.[2]

1.3 In the light of what we heard at those meetings and the written responses, we reviewed our proposals, and our Final Report, published alongside this document, sets out our analysis of the responses we received, and our final recommendations.[3] As would be expected, in many cases these recommendations reflect the provisional proposals in the Consultation Paper; but in several instances we have withdrawn or amended proposals, and in a few we have added new recommendations, based on our research and consultees' responses.

1.4 The Final Report is available, both in English and in Welsh, on the Commission's website www.lawcom.gov.uk/planning-law-in-wales.

1.5 We received 165 responses, from a wide range of individuals and organisations – see Appendix A for complete list.

1.6 We heard from most of the planning authorities in Wales – both local authorities and national park authorities – and various local authority representative bodies (including POSW). We also had representations from 21 community and town councils, and from a range of other public bodies. We have had a number of meetings with officials from the Welsh Government (including Cadw). And we had particularly helpful comments from the Planning Inspectorate ("PINS").

1.7 We had a range of views from developers, landowners, and housing bodies. And we had many representations from third sector organisations (including national and local heritage bodies, faith groups, tree-related organisations, and others) – not least in relation to our proposals in Chapter 13 (the historic environment) and Chapter 15 (trees and woodlands).

1.8 And we received responses from a range of professional bodies (representing barristers, solicitors, architects, planners, surveyors, engineers, conservation

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1 *Planning Law in Wales*, Law Commission Consultation Paper Law, Com No 233, November 2017.

2 In a small number of cases, we have redacted the names of respondents, at their request, or removed details that might identify third parties where we considered that would be unhelpful.

3 *Planning Law in Wales*, Law Commission Final Report, November 2018.

professionals and others), and from individual professionals and other individual respondents.

1.9 Some consultees produced general comments relating to the codification exercise as a whole. Some responded to every question, in many cases in considerable detail. Some responded to just a few questions that were of particular concern; or to one chapter.

1.10 We are very grateful to all those who took the time and trouble to contribute in this way.

The arrangement of the responses in this document

1.11 The responses have been set out in relation to the Provisional Proposals to which they relate. In a few instances, consultees referred to paragraph numbers in the Summary, rather than provisional proposals; we have attempted to allocate each such response to the relevant proposal. Occasionally, all or part of a response was more relevant to a proposal other than the one to which it was ostensibly responding; in such cases, we have re-allocated it as appropriate.

1.12 In relation to each provisional proposal, we have set it out in the form in which it appeared in the Consultation Paper, followed by an analysis of the total number of responses, and the number of those that were broadly in favour of the proposal (with or without further comment), equivocal, or against it.

1.13 We have then set out the text of each response, generally arranged under the following headings:

- responses strongly in agreement;
- responses in agreement (without further comment);
- responses in agreement (with additional comment);
- equivocal responses;
- responses disagreeing (without further comment);
- responses disagreeing (with additional comment); and
- responses strongly disagreeing.

1.14 Not every heading is used in relation to each proposal. And we have used alternative groupings where appropriate.

1.15 We have grouped together responses that were in identical or very similar terms – using as far as possible the wording of the most comprehensive one.

1.16 At the end of each chapter are comments that relate to the Chapter as a whole, rather than to any particular proposal within it.

Chapter 2: Towards a new planning code

Value of consolidation

2.1 *Planning Inspectorate (PINS):* The Inspectorate is generally supportive of the suggested proposals, and the Law Commission has set out many worthwhile and reasonable improvements to current planning legislation.

2.2 *RTPI Cymru:* RTPI Cymru supports a fully bilingual statute applicable to the planning system in Wales as discussed from paragraph 1.69 of the consultation document. There is a need to ensure that practitioners can easily access and identify the laws applying in each country.

2.3 *Blaenau Gwent CBC:* The exercise of consolidation is welcomed.

2.4 *Ceredigion County Council:* Ceredigion County Council generally welcomes the consolidation and codification of Planning Law in Wales,

2.5 *Neath Port Talbot CBC:* On the whole NPT are supportive of the codification proposed as the planning legislation is too complex and it is essential that practitioners are able to provide accurate and robust planning advice in order to deliver a quality and resilient planning service in Wales, not only at the moment but also in the long term.

2.6 *Newport City Council:* Yes, there are masses of legislation relevant to Wales and it would be helpful for a consolidated code.

2.7 *Pembrokeshire Coast National Parks Authority, National Parks Wales, Carmarthenshire County Council:* Definition: **codification** is the process of collecting and restating the law of a jurisdiction in certain areas, usually by subject, forming a legal code.

We agree that the LC's report presents an overwhelming case for the creation of a new Planning Code for Wales. The details of what this should include, its timing and the need for a commitment for continual updating are all issues which those involved in planning at the coalface have had concerns about – these concerns are expressed below and hopefully provide an insight into the reasoning behind these comments.

2.8 *National Grid:* The suggestion seems intended to provide useful foundations to the broader revisions to the planning system in Wales. There is a logic to the structure proposed, the revisions seem likely to work well, and should help to achieve the stated aims.

2.9 *Theatres Trust:* This Bill appears to propose significant amendments to the planning system in Wales. In principle, the Trust is supportive of the stated intention to simplify and consolidate planning law in Wales which would result in a single Planning Code also containing relevant secondary legislation and Government guidance.

2.10 *Presteigne and Norton Town Council:* The combining of the various separate pieces of legislation into one was felt to be very sensible and to be very helpful to the lay person.

2.11 *Cynwyl Elfed Community Council:* Generally – there is a need to order the current legislation, to clean and eliminate legislation which is never used. But, care should be taken to keep the important legislation.

2.12 *Llantwit Major Town Council:* Llantwit Major Town Council felt the paper concentrated on improving and simplifying the Planning Law process which is outside the remit of Town Council Planning criteria.

2.13 *Llandysilio Community Council and Llandrinio & Arddleen Community Council:* [We] appreciate the overarching importance of tidying up and bringing together the existing Planning Law.

2.14 *National Trust:* National Trust recognises the complexity and sometimes confusing structure of planning legislation in Wales. There is continued lack of clarity about which Westminster legislation applies in Wales.

National Trust welcomes the work of the Law Commission and the principles of simplification, consolidation and codification of planning law in Wales. We consider the proposals are ambitious, challenging but potentially demanding on the time of all involved in the planning system in Wales.

National Trust welcomes the potential benefits of greater engagement and involvement in the planning system with simplification and codification. The current challenge is an evolved planning system based on over 50 Acts of Parliament and around 150 pieces of secondary legislation. The proposed direction is consistent with recent changes to the planning system in Wales. National Trust welcomes the opportunities that the consultation brings forward for greater understanding and accessibility.

Paragraph 1.58 explains the differences between Assembly Acts and Acts of the United Kingdom (UK) Parliament. There is uncertainty how such issues might be dealt with in the future, including the impact of further devolution to Wales and Brexit issues. The Law Commission could produce guidance on this following on from their analysis.

National Trust supports a fully bilingual statute applicable to the planning system in Wales as discussed at 1.69.

National Trust supports the statement at paragraph 1.71 setting out the need to ensure that practitioners can easily access and identify the laws applying in each country.

2.15 *North and Mid Wales Association of Local Councils:* There many Planning Acts starting in 1947. In 1962 the main Act (as we see it today) came into effect. A further main Planning Act came into effect in 1968. The Planning Act 1990 did consolidate a lot it did not cover every area. It is also an issue that Planning in Wales is different in

some areas with that in England. The Association supports the introduction of a Planning Bill which consolidates all the others.

2.16 *Welsh Language Commissioner's Office:* From my experience of scrutinising the Planning (Wales) Act 2015 I can appreciate the enormity of the work you have undertaken. Furthermore, I also support the intention to try and simplify and reinforce planning law as it is relevant in Wales and to produce a new Planning Bill and Planning Code. Such a move would also provide an opportunity to ensure that a large piece of legislation which affects Wales is available through the medium of Welsh. The rest of my comments will involve planning law and the Welsh language specifically.

2.17 *Arup:* Clearly, rationalising the excessive amount of planning legislation in Wales is a significant step towards streamlining the existing planning system and will ultimately benefit all stakeholders involved. When undertaking this work it should be ensured that the end result is a much more accessible body of legislation that establishes clarity and enables consistent application across planning jurisdictions (local planning authority areas and higher authorities such as the Planning Inspectorate).

2.18 *UK Environmental Law Association:* The central themes of consolidation and clarification rather than attempting significant amendments of the substantive law are to be welcomed. Broadly the proposals are in line with those aims (although note the specific concerns documented below).

2.19 *Janet Finch-Saunders AM:* Clearer, more accessible guidance for applicants, objectors and all relevant parties must be an utmost priority as regards planning law. As noted in the consultation, there are more than 25 Acts of Parliament and the Assembly covering planning law, making it often complex to navigate for many.

2.20 *Elfed Williams, ERW Consulting:* I find there is nothing I especially disagree with in your provisional proposals.

2.21 *Tidal Lagoon Power:* We recognise your description of a complex picture of 'planning system' legislation in Wales, and are encouraged that it is a matter the Welsh Government and Law Commission are addressing to inform work on a Bill to tackle these complexities. From a developer's perspective, the additional cost with dealing with complex and duplicating processes, and the risk associated with uncertainty or duplication are both elements that impact on the prospect of attracting investment in/to Wales (investment which is of course necessary to meet some of the objectives of the planning system in Wales, as reflected in policy, to meeting population needs such as housing and infrastructure, and to drive a low carbon economy).

I regret not to have been able to provide a response to the Law Commission's initial scoping report because the comments below (on this consultation) report refer to elements that you have scoped out in large part by this stage. It is no surprise that the previous consultation (on scope) provided you a steer to focus on fixing existing/reoccurring/common problems with the system (which are probably reflecting regular frustration of local planning authorities and housing developers – those who interact most with the 'core' planning system in Wales). I have no doubt that focusing on solutions to these problems will reap efficiencies and reward.

2.22 *Innogy Renewables UK:* We welcome many of the recommendations included in the Law Commission's consultation which should address the complex and often confusing structure of the existing legislative framework in Wales. We therefore support the work of the Law Commission, along with the principles of simplification, consolidation and codification of planning law in Wales.

2.23 *Allan Archer:* there are many aspects of the Commission's analysis and general conclusions about the problems with the legislation as it currently exists with which I agree - the complexity and confusing structure of the existing legislative framework and the lack of clarity about which Westminster legislation applies in Wales with the consequent difficulties this causes for practitioners and users. I regularly find it very frustrating not to be able to access primary and secondary legislation in consolidated form and time consuming to have to laboriously create consolidated text from the original statute and subsequent amendments. I find it is not possible to rely confidently on general legal reference books, which often ignore differences between England and Wales, or the Government's www.legislation.gov.uk website which is often not completely up-to-date.

2.24 *Owain Wyn:* In general, I am supportive of the reforms suggested in the Consultation Paper and I congratulate you on the thoroughness of the work. I have some points on the specific subjects noted in Part 2.

2.25 *Planning Aid Wales:* As an organisation that seeks to improve understanding of, and accessibility to, planning processes, PAW strongly supports the proposals to clarify and simplify statutory planning provisions.

2.26 *Chartered Institute of Building:* The CIOB welcomes steps taken to simplify planning law.

2.27 *Douglas Hughes Architects Ltd:* Chapter 1: We broadly welcome legislation related to land use and development and believe that by doing so it will save unnecessary time, work and expense both for our clients and ourselves.

The Law Commission is no doubt aware of the RIBA plan of work, which breaks down our level of service on behalf of our clients into core areas. We usually manage the whole process from undertaking surveys and sketch schemes through to completion of works on site. The area that proves most problematic for us to manage is Stage 3a, which relates primarily to obtaining planning permission. The contemporary market demands that we supply our clients with fixed fees for passing milestone markers. This means we are asked more often than not to provide a lump sum fee for obtaining planning permission, which we find extremely difficult to gauge. From the most simple of house extensions to complicated developments on brownfield sites, obtaining planning permission is often fraught with complication and difficulty. Simplifying the planning process and providing our clients with more certainty would therefore be most beneficial and welcome.

Aside from making considerable savings for our clients we are of the opinion that more simplified codification and streamlining of the planning process could save our practice in the region of £31,000 to £40,000 per annum. This is because if a project becomes stuck in the planning system, whatever the reason, then we bear the cost. We have assessed this quantum in relation to our turnover per annum and this

represents nearly 10%. Such cost overruns are difficult to sustain for a medium-sized architectural practice. Moreover this does not take into account delays incurred by our clients who cannot start on site for planning reasons, with the consequential impact this has on cash flow and key milestones.

Echoing the above comments, as long as there is absolute clarity around key issues (such as the purpose of the planning system, formulation of the development plan, nature of development, process of seeking permission and unauthorised development) and that there are administered with the same care and attention by the LPAs, then we would envisage a great advantage to the proper functioning of planning in Wales.

2.28 *Home Builders Federation:* The HBF are supportive of the general principle of codification and note that this second consultation has considered far wider issues than original envisaged. We do however have some concerns that some of the areas of proposed change are ones which the industry does not have issues or problems with so question the need for change.

2.29 *Royal Society for the Protection of Birds:* We welcome your consultation and fully support the progressive move towards a comprehensive but simpler planning code in Wales, especially in the context of devolution and the increasing divergence between the law in Wales and other parts of the UK.

2.30 *Redrow Homes:* Redrow supports the principle of a new Planning Code to consolidate existing planning legislation. This includes the removal of legislation that has never been used or not been applicable for many years.

Redrow believes that many of the suggested changes are improvements. However, change for the sake of change should not be made. Examples of this are made above. Also, if changes are put forward then Redrow would welcome such changes that can potentially speed up the planning, and related, system to enable development to start on site more quickly and/or prevent delays/impacts once sites are up and running.

2.31 *Andrew Ferguson:* In general, I wholeheartedly support the intention to simplify, consolidate and modernise planning law in Wales as the current legislation is not user friendly in the slightest. Having the legislation in one place, as one resource, would be invaluable to planning practitioners and all users of the system. At the present time, it is very difficult to find out what is applicable in Wales at any time, often involving cross-referencing with several other statutory instruments, and even when you do find what you're looking for, you're not entirely sure that it everything has been enacted in Wales and you query whether you've missed something along the route.

Given issues over what parts of legislation have been enacted in Wales (and when) and the difficulty in finding this information in the first instance, what is proposed as part of the code to ensure that all users are clear about the status of the relevant sections and whether they have been brought into force?

2.32 *Bar Council:* The Bar Council supports the Law Commission's objectives in proposing reforms to planning legislation in Wales through a consolidation and simplification of the current legislation. The proposed reforms would also seek to incorporate some of the legal principles established through case law but which are

not currently set out in the current legislation. We agree that such an approach would make the planning system in Wales far more accessible to the public as well as to those more used to dealing with the planning system, would help avoid inconsistent decisions being made and bring about greater fairness overall.

For this reason, we agree with the majority of the proposals in the consultation paper. Those that we do not agree with are few in number and the disagreements are small. Our responses reflect the Bar's overall position and do not specifically reflect the views of the Planning & Environmental Bar which more helpfully may respond in its own right. In addition, it has not been possible to respond to those questions which the invite specific examples of statistical evidence.

2.33 This consultation response is formally distinct from that provided by PEBA.

2.34 The primary concern is to ensure that the provisions meet the Bar Council's overarching interests:

- Promoting access to justice for all;
- Clarity in legislative drafting;
- Advising on matters related to the rule of law

In our earlier Consultation response, we set out our support for the Proposals, within the broader context of the Law Commission's project on the Form and Accessibility of the Law Applicable in Wales, reflecting its report ("Form and Accessibility Report") which was published contemporaneously with the previous Paper.

The Bar Council will continue to seek to assist as best it can in this process in the event that it goes forward.

2.35 *Mineral Products Association:* We applaud the recognition of the need to review the system and feel this is long overdue, however, whilst planning law is undoubtedly overly complex, we do not feel that the measures proposed in the consultation will improve the effectiveness and efficiency of the system. We are somewhat concerned that the scope of the review may have been overly restrictive and those consulted on the scope somewhat limited.

2.36 *Churches' Legislation Advisory Service and Cytûn (Churches Together in Wales):* Neither CLAS nor Cytûn, nor our member Churches, takes a view on the principle of codification and consolidation of planning law in Wales. However, in giving evidence to the Culture, Welsh Language and Communication Committee of the National Assembly for Wales on 22 November 20172, Cytûn and two of its member Churches indicated that they are not hampered by the current lack of such consolidation and would not perceive it to be a legislative priority.

General structure of codification

2.37 *Ceredigion County Council:* Reservations about the practicability of including policy and advice/guidance in a Code.

2.38 *Carmarthenshire County Council:* On the question of the nature of legislative Codes the WG says: "In our view the word "code" implies something comprehensive, not one part of the legislative framework. As such we do not see why a Code should not be wider than a single Act, nor why it should exclude the subordinate legislation and quasi-legislation on a topic. We consider, therefore, that our Legislative Codes should be comprehensive, in that they should contain (to the extent practicable) all of the legislation and guidance or other similar documents made under the legislation that falls within the subject matter of the Code. Further, the existing hierarchy within, and delineation between, the legislative instruments (primary, secondary, etc.) should remain. All of the content of a Code will be made in both English and Welsh (both, of course, having equal standing)."

2.39 *Pembrokeshire Coast National Parks Authority, National Parks Wales, Carmarthenshire County Council:* The important points are:

- support for codification rather than consolidation of the legislation;
- maintenance of a clear distinction between primary and secondary legislation;
- support for creation of a comprehensive Planning Code of the primary planning legislation as a first priority (as part of the WG's initial codification programme);
- support for a programme of codification of secondary planning legislation, with an indication of priorities as Permitted Development provisions, the Use Classes provisions and the Development Management Procedure provisions;
- support for publication of policy and guidance/advice documents in codified form;
- support for effective arrangements for the maintenance of codified documents;,
- support for effective arrangements affording free and easy access for all to up-to-date bilingual versions of all primary and secondary legislation, policy and guidance/advice;

2.40 *Newtown and Llanllwchaiarn Town Council:* Terminology: the use of the word ‘code’ is somewhat confusing. This is often used to describe de facto and recommended practice rather than law. It would appear that what is actually being put forward is a planning law framework comprising law, secondary legislation and guidance notes (a code).

2.41 *Pembrey and Burry Port Town Council:* 1.2 – The Committee stated that clarification on which laws apply in which circumstances is needed as confusion happens often.

2.42 *Monmouth Town Council:* The committee feels that it would be very helpful to everyone if the language used was in plain English and used less technical terms. The reading of such documents that is full of technical jargon is off putting.

In the past with documents relating to consultation papers or reference documents paragraphs are often repeated throughout the document. We as a committee feel that the repetition of paragraphs throughout the whole document is long winded and can easily put people off reading the whole document. We would respectfully request that this process be used less often.

2.43 *Bar Council:* We would further recommend that the term "Code" is defined within the provisions. Whilst it is accepted that the term is familiar to planning practitioners as a collective description in Compulsory Purchase legislation and case law, it is not yet well established in the Law of England and Wales and requires some definitional precision, particularly in respect of the interaction between primary legislation, secondary legislation and (national) planning policy.

2.44 *Allan Archer:* I have read, also with great interest, the Commission's Report on the Form and Accessibility of the Law Applicable in Wales and the subsequent correspondence between the Commission and the Welsh Government. I note the explanation of the differences between consolidation and codification of the law and of the difference of opinion between the Commission and Welsh Government on the scope of what should be included in a Code.

With regard to the first point, I think the Commission's two reports present a clear case for codification in preference to consolidation. and that the consultation report presents an overwhelming case for the creation of a new Planning Code for Wales which I strongly support. Having said that, either consolidation or codification is infinitely preferable to leaving things as they are.

On the second point, you recommended that each new piece of primary legislation be called a Code but I see that the WG has decided to use the term to describe a compendium of primary and secondary legislation together with associated policy and guidance on a particular subject. While I can see that, at the end of the day, it is the WG who will ultimately determine the scope and programme of codification, I do have some views on this point.

I think it is important to maintain a clear distinction between primary and secondary legislation and between legislation and policy and guidance. Given the resource demands of a comprehensive codification , as envisaged by WG, I think the over-riding priority is the creation of a comprehensive Code of the primary planning legislation. Because of its importance from a user perspective and, as some will be required to support the new Code of primary legislation, I would also support a programme of codification of secondary planning legislation. - I think (but I recognise that others may have other opinions) that the priorities would be the Permitted Development provisions, the Use Classes provisions and the Development Management Procedure provisions;

I also support the creation and publication of policy and guidance/advice documents in codified form, although I have reservations about the practicability of including all policy and advice/guidance in a Code (given the variety of forms that policy and guidance are produced in – see the list of topics on the WG's Planning policy and guidance web page) although I would be less concerned if it was limited to the WG's policy documents PPW and TANs. However, if all elements of legislation, policy and guidance are to be brought together in a single Code then there would need to be a

clear distinction between these categories and a clear understanding of the question of precedence - there is an obvious scope for misunderstanding without this clarity.

Nevertheless, I am struggling to imagine what such a comprehensive Code would look like and how easy (or not) it would be to access and use. It is one thing to create a Code but it requires a continuing commitment to maintain and update it and to create effective arrangements affording free and easy access for all to up-to-date bilingual versions of all primary and secondary legislation, policy and guidance/advice. Even well resourced, considering the correspondence with WG after your earlier report, it seems that this could be a long process with the possibility of it being postponed or slowed down if there is an over-riding need to introduce replacement 'European' legislation.

2.45 *RTPI Cymru:* We seek further clarification of the meaning of consolidation and codification of planning law. The use of the term 'code' and its wider interpretation requires some consideration. We also question how widely the term is understood in this context. Footnote 2, at page 3 of the consultation document, indicates a difference of opinion between the Law Commission and the Welsh Government on what constitutes a Code. The Law Commission "recommended that each new piece of primary legislation be called a Code" but "the Welsh Government has decided to use the term to describe a compendium of primary and secondary legislation together with associated policy and guidance". There are important legal and procedural matters to consider and the Welsh Government will need to determine the scope and programme of codification. We would recommend an introductory paragraph to explain this, particularly for non-lawyers.

At the RTPI Cymru event in November 2017, the term "codification plus" was set out as a possibility for the future. This term also requires further explanation and clarification.

Paragraph 1.7 of the consultation document states that in England and Wales as a whole, there are now over 50 Acts of Parliament and around 150 pieces of secondary legislation. In light of this, it would be helpful to have greater clarity over the scope and structure of the Code, particularly given the differences in views expressed by the Law Commission and Welsh Government at footnote 2. Thought also needs to be given to how a Code is published to ensure that it is easy to access and identify a topic of interest. Even a large code should be able to be made intelligible and easily accessible.

2.46 *National Trust:* We would consider at the outset, clarification of what constitutes a Code. We note footnote 2, at the bottom of page 3 of the consultation document, indicates a difference of opinion between the Law Commission and the Welsh Government on what constitutes a Code. The Law Commission "recommended that each new piece of primary legislation be called a Code" but "the Welsh Government has decided to use the term to describe a compendium of primary and secondary legislation together with associated policy and guidance".

2.47 *Andrew Ferguson:* If there is to be a specific Code website, it would be extremely useful to have a link to any enacting legislation, and for this to be updated regularly. If not, it must be absolutely clear (or easy to ascertain) about what provisions are in

force and when they were enacted, otherwise it will result in the same confusion as exists currently.

It is also suggested that prior to the Code being enacted, it is made available in draft (in as complete a version as possible) so that practitioners can consider the impacts of the legislation as proposed and provide feedback to try and reduce the unintended consequences that will surely follow on from an exercise such as this.

2.48 *Huw Evans:* There is full support for the review and rationalisation of the existing legislative framework and the bringing it together into no more than 2 Acts. However there needs to be a distinction between primary and secondary legislation and clarity on the role and weight to be given to Orders, Regulations, Circulars, Case law, Ministerial Statements together with Welsh Government policy, advice and guidance. Greater clarity as to what is meant by a 'Code' would be helpful.

Secondary legislation

2.49 *Arup:* In this context, it is understood the current proposals only relate to the tangible reform of primary legislation, whereas secondary legislation will only be consolidated and will not necessarily be improved upon. To achieve clarity and consistency of the planning system it is our opinion that secondary legislation should be reformed in tandem with primary legislation. Without meaningful reform of secondary legislation, existing ambiguities within such legislation will perpetuate inconsistencies of the planning system and its existing operation.

It could be argued that secondary legislation and not primary legislation is the principal barrier preventing a more streamlined and consistent planning system insofar as The Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (DMPWO) and The Town and Country Planning (General Permitted Development) Order 1995 (GPDO) as amended prescribes how primary legislation like The Town and Country Planning Act 1990 (TCPA) is applied in practice.

For example, the DMPWO will prescribe the submission requirements associated with the various types of consent under the TCPA and it is the drafting of these provisions that present as the most problematic in practice due to the scope afforded to local planning authorities in how they can interpret and apply the regulations. Similarly, the GPDO will prescribe the requirements for general consent under the TCPA and it is here that significant disparities can occur between local planning authorities when interpreting rights afforded under general consent and how they are applied in practice. The following themes have been identified as having potential to contribute towards achieving this underlying principle; to create a streamlined and consistent planning system that will ultimately make it easier for appropriate development to come forward quicker and more efficiently. We trust that these themes can then be translated by you into meaningful reform of existing legislative provisions.

Production of Code: available resources

2.50 *POSW, North Wales Development Managers' Group , Monmouthshire County Council, Ceredigion County Council, Pembrokeshire County Council,*

Carmarthenshire CC, Pembrokeshire Coast National Parks Authority, Neath Port Talbot CBC: The issue of resources to carry out a codification programme and maintain and publish Codes effectively thereafter is a serious issue which is touched on in the consultation (and, more so in the other LC report). Even effectively resourced, this could be a long process with the possibility of it being postponed or slowed down if there is an over-riding need to introduce replacement European legislation.

2.51 *POSW, North Wales Development Managers' Group , Monmouthshire County Council, Ceredigion County Council, Pembrokeshire County Council, Carmarthenshire CC, Pembrokeshire Coast National Parks Authority, Neath Port Talbot CBC, National Parks Wales:* We share the LC's concerns on this point and would rather the WG took a reasonable and practical approach to producing the Code – establishing it within a reasonable timeframe and producing a useable Code – it would be better to take on too little than too much in view of the changing legislative landscape which we can predict with some certainty with Brexit on the horizon. It would be wasteful of resources to have to put this exercise on the back burner whilst other more pressing legislative problems are resolved.

2.52 *Bar Council:* We reiterate that it is self-evident in the Bar Council's view that the aims behind a wholescale re-drafting or rather re-configuration of planning related legislation in Wales will require significant political will and support for the project accompanied by a recognition that the process is most likely to take a considerable period of time. The envisaged benefits therefore from this proposal will also have to await. The alternative of more piecemeal reform may necessarily be more attractive.

2.53 *RTPI Cymru:* One key issue arising from the early sections of the consultation document is the extent to which a codification exercise only makes sense if it is done as a whole, as a full consolidation exercise, rather than leaving out some parts or suggesting further parts as additional resources become available. The vertical relationships should also be better articulated. The timing of this work is therefore key.

The issue of resources to carry out a codification programme and maintain and publish this effectively thereafter is a matter that is touched on in the consultation and, more so in the Planning Law in Wales Report (June 2016). Even effectively resourced, this could be a long process. Further stretched/complicated by the possibility of it being postponed or slowed down if there is an over-riding need to introduce replacement European legislation. Paragraph 2.33 makes a valid point in relation to how Welsh Government will ensure delivery of the project. Timescale, resources, commitments to delivery etc are all important elements in the success of this project.

2.54 *National Trust:* Codification will be a very challenging and complex process. To be successful the project requires sufficient funding and a specific delivery timescale.

Training to cope with new Code

2.55 *Ceredigion County Council:* seeks consideration as to support for the costs of re-tooling Development Management systems to align with the new code.

Updating of Code

2.56 *Ceredigion County Council:* Simple to use – one point of contact – system available through the Welsh Government Website in a similar vein to PPW. Relying on private/external sources for updates will undo the entire premise of the original exercise. This will require substantial and ongoing resources from Welsh Government to achieve this with an equivalent degree of public confidence to that currently experienced in the government legislation website www.legislaation.gov.uk.With regard to the resource issue, now would be the time to ensure that the legislation moves with the times and allows Planning Authorities to advertise applications in new innovative ways and do away with the requirement for newspaper advertisements. This would substantially reduce costs to many authorities and would reflect provisions within the TCP (LDP) (Wales) (Amendment) Regulations 2015 that remove the requirement to publish information on stages of LDP preparation in the local press.

2.57 *POSW, North Wales Development Managers' Group , Monmouthshire County Council, Pembrokeshire County Council:* It should be simple to use – a one point of contact system available through the Welsh Government Website in a similar vein to PPW. Relying on private/external sources for updates will undo the entire premise of the original exercise. This will require substantial and ongoing resources from Welsh Government to achieve this.

2.58 *Ceredigion County Council:* seeks assurance by Welsh Government that, once codified, there would be a continuing commitment to further changes being incorporated into the code;

2.59 *Ceredigion County Council:* seeks changes subsequent to issue of the code should be footnoted with date of incorporation / date of implementation;

2.60 *Carmarthenshire CC,* The need for continual updating by WG is an issue that needs careful consideration and ultimately long term funding if this exercise is to have the results it intends.

2.61 *Neath Port Talbot CBC:* This codification exercise should therefore be able to withstand the test of time and as far as possible it should be updated as one document every time the legislation is changed or added to. This is the process which has been used by Welsh Government in relation to Planning Policy Wales, which is now a living document which is updated regularly in electronic form. It would be a missed opportunity to go through this process and then allow the document to become out of date as soon as it is published if it isn't in a format which allows it to be a living document. The importance of this cannot be over emphasised.

2.62 *Public Service Ombudsman for Wales:* I welcome the proposal to consolidate and simplify planning law in Wales, with a view to creating a new Planning Code. Our investigation of a complaint entails us having to identify the relevant legislation applicable to the subject matter in question. My staff invariably find it very challenging to locate Welsh planning law and we believe that codification would be a great help.

However, it is equally important during our investigations to be able to identify what the law was at any given point in time (that is, what the law was when the problem

we are investigating occurred). Therefore, it will be important to have an archive where previous 'editions' of the Code can be easily found.

2.63 *Huw Evans:* The current planning system is rigid and not flexible enough to respond to frequent and significant changes which are very often global and a result of changing technologies which impact land use. As a result the planning system tends to be reactive and not the enabling mechanism that is necessary for healthy local economies and community well-being. The difficulty is having a planning system that is stable enough to give developer and community confidence but which is responsive enough to manage change. The manner in which the Code is monitored and reviewed is crucial. Guidance needs to be given as to how the Code is to be revised and assurance that there are adequate resources to maintain it.

The maintenance of the Code

2.64 *RTPI Cymru:* This feeds into the wider issue of what should go into primary and secondary legislation in relation to the balance between durability, longevity and stability of the legislation on the one hand, and flexibility on the other. We question which is better for preserving the advantages of consolidation? Paragraph 1.4 should address how we can frame the law in this exercise to promote stability over time, which may mean focusing on a more skeletal Act that is more able to endure political change over time? While it is difficult to stop the process of political change, the consolidation into the Code should make it easy to identify and navigate the area of law or guidance of interest and give confidence that the content is complete and current. However, there also needs to be the ability to track changes to be clear about what has been changed, when and why. Paragraph 1.76 recognises that continual change around legislation cannot be prevented, however that law could be drafted in such a way as there is greater durability of the primary legislation. Primary legislation would be more enabling and concerned with matters of principle and that much of the detail would therefore be devolved down to secondary legislation.

General comments

2.65 *Friends of the Earth Cymru:* The Aarhus Convention of which the UK is a signatory, states in Article 1 Objective "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention". In considering the simplification of the planning system in Wales (in a system much complicated by the Planning (Wales) Act 2015 as well as accretions of legislation over the years), each provision that is discarded or simplified must follow the Aarhus test - is there an opportunity for the public to find out what is happening in a timely way and respond? Planning should not simply be a series of negotiations between a developer and planning officer. This is particularly important in light of the principles of collaboration and involvement enshrined in the WFG Act 2015.

Chapter 3: Scope of codification exercise

Historic environment

3.1 *Andrew Ferguson:* 3.9: Intention to create a Historic Environment Bill relating to LBs, CAs, SAMs and other monuments – I would query whether this legislation would dilute the process from the outset?

3.2 *North and Mid Wales Association of Local Councils:* The Association supports the proposal of a separate Bill for the policy with regard to Listed and Historic Buildings and their Environment.

Trees

3.3 *CMet Residents Group:* We agree with your conclusion with regard to 3.61(3) [inclusion of trees] and are presently considering, with advice from the Woodland Trust, how we enable our Queen Wood to gain protected status from our local Council.

Positive planning

3.4 *CMet Residents Group:* We welcome the Commissions' point contained in paragraph 3.66 which emphasizes that a planning authority should be proactive in dealing with applications rather than reactionary. In our case we made a large number of objections to the planning authority and were disappointed by their response in which there was no suggestion of positive action but rather a focus on the development structure rather than its impact. We would hope that a statement requiring positive action would be included in the Code to ensure the planning authority is encouraged to take a balanced approach in determining an application.

Countryside and rights of way

3.5 *RTPI Cymru:* We raise strong concerns at the proposal at paragraph 3.7 relating to the separation out of 'the rural environment'. Further information is required in this case. It is important to ensure that separation of rural environment does not undermine the application of core planning law across urban and rural contexts. This appears to see the rural environment legislation divorced from planning (as the principle of having a Planning Code is that it incorporates all the legislation relating to planning, so to have a separate Rural Environment Code implies that it is separate from planning). It may be appropriate to have additional elements of the Code which are only relevant to rural areas, but this needs explanation.

3.6 *National Trust:* National Trust is concerned about the inclusion and separation of "the rural environment" (Section 3.7). Does the existence of a separate Rural Environment Code separate rural issues from planning?

3.7 *Allan Archer:* I have some concern about the possible splitting away of rural planning from urban planning if the proposed Planning Code was to be separated from the Countryside and Rights of Way Code, because of their inter-related nature and also

where other natural environment legislation, which will likely arise after Brexit, will fit in? Also, why not include Hazardous Substances in the first phase of work if it is relatively self-contained as this should not create a major problem for consolidation.

3.8 *Huw Evans:* Reference to a code for the Rural Environment needs clarity. There are very distinctive issues relating to the rural environment but how these are dealt with through the development plan and in day to day decision making may well be a matter for WG policy and technical advice.

3.9 *Open Spaces Society:* The recent Planning Wales Act 2015 (PWA) involved a thorough revision of planning legislation and supporting guidance and followed extensive consultation with relevant stakeholders. The OSS gave evidence to the Environment and Sustainability Committee when the original planning bill was being considered by the Welsh Government.

It seems premature to propose the wholesale repeal of this Act after the lengthy process only recently undertaken. The full implications of the Act need to be assessed in due course and once fully implemented further analysis carried out.

It is very odd that the consultation does not make any reference to Part 8 of PWA, which alters the existing town and village green (WG) legislation by amending the Commons Act 2006. We would question whether this was intentional or an oversight. If PWA was repealed would the position in respect of WGs revert to the current position, whereby there are no restrictive 'trigger events', preventing TVG applications, and no provision for the deposit of landowner statements to prevent rights being established. Would the amendments made to the TVG legislation be embedded in the replacement legislation? Or are there plans to introduce something else?

There is a missed opportunity not to include in the proposed new planning act the statutory protection of open space and its use by local people. The seven principles in the Wellbeing and Future Generations (Wales) Act 2015 make clear that open space protection is crucial to the economy health and wellbeing of Wales. Protection of open space should not be left to policy guidance, such as the current out of date TAN 16 (2009). Such guidance can be changed leaving open space vulnerable to disposal.

There should be a specific power, under any amendments or replacements of section 106/ClL, to require a developer to dedicate land for public benefit, for instance as TVG under section 15(8) of the Commons Act 2006, for public access under section 16 of the Countryside and Rights Of Way Act 2000, or as a public right of way.

Unless there is specific supplementary planning guidance, the fact that land is registered either as common land or WG is not regarded as relevant in respect of 'material consideration'. It is essential that this is rectified as the status of the land is clearly relevant to the determination of any planning application.

There are various references to public rights of way (PROW), highways legislation and procedure. In particular, at section 3.101 there is the statement that PROW are not going to be considered at this time. However the new planning code and statutes may include re-enactment of section 257 of the Town and Country Planning Act 1990

which is proposed to be repealed. If so it should contain clarification that the decision maker is entitled to go behind the necessity of the order, and refuse to confirm the order if satisfied that the development could have been arranged so as to avoid interference with the PROW.

If Grampian conditions are to be codified, it is arguable that the delivery of a condition need not necessarily be wholly in the gift of the developer, and this should not make a condition unlawful. It should be expressly stated that it is permissible to make such a condition.

There is no need for highway to be defined, as its meaning is clear, and it is not appropriate to define curtilage as this is subject to fact and degree, and any statutory definition would merely replace a corpus of court precedent with a form of words which is unlikely to generate any new clarity.

3.10 *Cynwyl Elfed Community Council:* 3.10 – this was noted. It is hoped that rural legislation will be a matter for consultation in the future.

Additional consent regimes

3.11 *Home Builders Federation:* The HBF suggests that some additional areas that could be looked at would be changes that could help speed up the development process. For example those matters where we need planning before we deal with other issues, such as Public Right Of Way diversions or dealing with NRW licences. Why could these not be dealt with at the same time as the planning application, something which is being looked at in England?

3.12 *National Grid:* Chapter 3 - Scope of Codification: The five themes set out in the consultation documentation are supported, and have provided a good framework for the work which has followed. The inclusion of such topics as listed buildings, conservation areas, and protected trees within the Code has a logic to it. The removal of provisions which have, in practice, been unused contributes to the overall simplification of the planning system, and is supported.

3.13 *Redrow Homes:* incorporating a Public Right of Way (PROW) diversion via a planning permission appears sensible. The planning permission consults the same bodies/people, considers the loss of the route and suitability of an alternative within its assessment. The inclusion of a proposal such as this process within a planning application submission would not dilute the current process. The advertising requirements could be covered by a specific additional fee for a planning application that seeks a PROW diversion.

Another example could be the inclusion of ecological licence matters within the planning application process (inclusive of discharge of conditions). As with the PROW example the same consultations are undertaken with both the planning application and the NRW licence application.

Redrow believes that further consideration to the consolidation of processes is warranted and whereby a notably change can be made to what currently exists. This is especially pertinent when the processes are sequential, as with the above

examples. Such changes could speed decision making up and allow sites to start quicker and not be subject to delays once started.

Chapter 4: Technical reforms to the legislation

Reform proposals

4.1 *Barratt & David Wilson Homes South Wales:* Our key concern is that the detail of the proposals within the November 2017 consultation paper goes beyond the scope of the initial consultation paper in November 2016, in that it is proposing significant changes to the development management procedure in Wales. Our view therefore is that the current consultation exercise should relate to the consolidation of planning law in Wales only, and any proposals to the development management procedure should be the subject of a separate, independent consultation, which is publicised appropriately.

As stated above, we welcome the consolidation of planning law in Wales in order to simplify the process such that it allows for everyone to engage in the planning process. However, our concern is that significant amendments are proposed to the development management procedure which go beyond the scope of simplifying legislation.

We have set out our comments on the proposed amendments above, but we would suggest that significant changes to the development management procedure should be subject to a separate planning consultation. It is possible that many stakeholders may not be aware of the full extent of the proposals and therefore the key changes to the development management procedure (i.e. the abolishment of the outline planning application process) should be advertised independently.

Case law

4.2 *Public Service Ombudsman for Wales:* I agree that the technical reform as discussed in this Chapter would be a sensible way forward.

Whilst I believe it would be useful if codification of case law formed part of the wider codification exercise, with everything in one place, I wish to strike a cautionary note. It is my view that if this approach is to be undertaken it will be important that the Code is updated frequently. This in turn means that it will need to be properly resourced to ensure that this happens. Care will also need to be taken to ensure that whatever is included in the Code is generally agreed to reflect the definitive position. Therefore, where there is any ambiguity surrounding case law and/or the matter has potential to evolve further, this should not be included.

4.3 *RTPI Cymru:* Paragraph 2.4(4) confirms the proposal to write into statute propositions derived from case law. RTPI Cymru supports the embedding of well-established case law propositions in statute, with the aim of simplifying discussions. However, if all elements of legislation, policy, guidance etc are to be brought together in a single Code then there would need to be a clear distinction between these categories and a clear understanding of the question of precedence. There is obvious scope for misunderstanding without this clarity. We also note that Welsh Government advice and guidance is published in many forms and there could be practical difficulties in incorporating all these different types of documents into a single Code alongside legislation. A well maintained Code, which includes future case law

where appropriate, that is effectively indexed would help stakeholders and users. We support the list of criteria at paragraph 4.54 of the consultation document for selecting case law for codification.

4.4 *Arup:* We would support the incorporation of principles established in case law within the new legislation. However, how these principles are applied and work in conjunction with existing secondary legislation and other guidance documents would need to be carefully considered.

The overarching principle should be to streamline the existing process and we would be mindful of including references to complex case law if such an approach would lead to an overly complex body of legislation.

Removal of redundant provisions

4.5 *Bar Council:* The Bar Council strongly supports improving the navigability of the proposed future statutory context by the removal of provisions which are no longer relevant. Specialist consultees may be able to advise if this omission would have any unintended consequences or represents a missed opportunity to update the position at law.

4.6 *National Trust:* Paragraph 1.55 discusses underused provisions. The removal of these unused or little used provisions sounds sensible and a key part of simplification.

CHAPTER 4: GENERAL COMMENTS

4.7 *National Grid:* The intention to modify the legislation based on clarification, streamlining, amendments to reflect practice, and rationalisation are clearly set out and, we believe, have been carried through into the proposals within the consultation.

The proposed rationalisation of the planning system within Wales will, we believe, have the long term effect of simplifying the operation of planning policy and development control in Wales. This is a useful change to offset some of the additional costs that may come from an increasingly divergent planning system in England and Wales.

Welsh planning is following a different path to planning in England, and that may have the tendency to increase the immediate costs and complexity of developing and delivering projects within Wales. Projects delivered by National Grid within Wales are expected to be largely linked to the maintenance and/or improvement of the national transmission systems for gas and electricity. The operation of these networks is a statutory duty, and as such any revision to the planning system in Wales will be absorbed as part of the normal business processes. This may not be the case for the other investors in Wales; we hope that a period of stability after the current cycle of change will allow Welsh Planning to establish a reputation for a clearer and simpler development environment that is attractive to developers and investors.

4.8 *Chartered Institute of Building:* Many in the built environment feel the industry is under constant external pressure to deliver the lowest common denominator and

lowest possible costs, without understanding the long term impact and true value of many more aspects of the built environment that is difficult or impossible to measure, such as biodiversity, health and wellbeing, open space, the circular economy, as an example. This could possibly be exacerbated by removing all checks and balances that planning does provide, so the optimal approach should be taken. The CIOB is looking to develop a tool for policy makers later this year where the wider benefits of construction investment decisions are outlined and can be taken into consideration. For example, the impact good quality design and build has on health, social mobility etc. We would be happy to outline this in further detail as necessary.

At present the planning system does not work in proportion to the size of the project and can act as a barrier to smaller developers being able to compete. This is especially true in the housing arena where there is a high level Welsh Government strategy for 20,000 homes to be built. This could end up being reliant on the 'big 6' housing developers. This approach should change to enable the whole of the Wales-based construction industry, a majority of who are micro and SME with less than 13 staff, to be afforded the opportunity to deliver on the need in Wales to develop housing numbers.

The CIOB believes it would be positive to see a 'pattern book' approach linked with construction and manufacturing in Wales to simplify delivery utilising timber modules, which would reduce cost and time. This potentially could be achieved through a fast track planning system for identified types of projects.

One of the current drivers for construction (via Construction 2025) is the reduction of delivery times by 50%. The central government Industrial Strategy also plans to make the wider construction sector more productive through the construction sector deal. This will not be possible on the 'on site' stage but if we could de-risk planning phase aspects like utilities and long lead-in materials, elements could be in place during that stage of a project. This should possibly be examined as a way forward.

With the regeneration drive of city regions, we should possibly look at temporary projects that infill designated areas (see Bristol's redevelopment) until they become finalised. This is often years of derelict sites spread around town and city centres that could be utilised for pop-up retail and commercial space.

4.9 *Radio Society of Great Britain:* For the most part it is unlikely that the proposed changes in primary legislation will have a direct impact on the ability of radio amateurs to receive planning permission for their aerials. However, there are a few proposals which may have, perhaps unforeseen, consequences as the result of the somewhat unusual nature of such proposals when considered in the context of the residential environment. My comments on the proposals are set out below.

4.10 *Steven Hansberger:* I currently live in Houston, Texas, United States of America, and as you can see from the main photo posted on my facebook page, I am looked at by my fellow countrymen as an "industrial revolutionist"; and indeed with no argument on behalf of myself. I was reviewing the article "Listed buildings under threat in Whales" on the Council for British Archaeology website, and I must say that removing the buildings would have what a friend of mine named … would say, "the consequences could be disastrous". I have spent many a year here in this great nation over here, which I am sure is not so much greater than Whales or any other

country in the United Kingdom, and one thing that I have noticed is how it has changed; and I do mean how. Journey with me if you will to the time frame in that picture that is on my facebook page, that is Broadway Street in Houston, Texas in the "roaring twenties". At that time, there were some things that were changing, but people did not really know where the change was going. I was spending some time in Denver, Colorado in 2017, and I noticed a huge train passing out from the center of the city that was carrying an outstanding amount of coal, and I asked myself, "Good God! Where are they going with all of that coal. That could be used to make so many trips across America using the invention of the locomotive. But I had to stop myself and admit that the concept of the locomotive like it was in the twenties has changed, and so has everything else. What I am saying is that from the time of the Puritans creating the thirteen colonies just outside Boston, to the twenties, and to our current age, "Planning Law" as you call it, does not exist here; and if it does, poor decisions have been made. This has created a decline in our culture. It has transformed the United States from being a pre-dominated Puritanical society, to becoming dangerously Socialist; and it will get worse if people do not wake up and "smell the morning coffee".

When I hear what I am hearing about what is going on in Whales, it makes me think about who is behind all of the negative decision-making. What are these people like? Is it really progress they are after, or is it something else? If it is progress, is it the right type of progress? I mean we could go back and forth all day about whether several blocks of stone buildings with a cobbled street or some aluminum buildings with concrete looks better; the truth is that unless you want to build another stone building, you probably should not tear it down; regardless of what people want from the land. People's wants change all the time, stone buildings do not, or should not. When we give people who are intoxicating themselves control over stone buildings, it contorts and perverts justice, and before you know it, we are all dressing like shit, and driving around cars that look like we are about to take flight. All because of what? Because we want to let someone that does not like what they see in the mirror, gain the right to remove a building that a wise and just King created? What has happened to everyone wearing a suit and top-hat, and women wearing beautiful dresses waiting for their train to arrive at the station? …

"My son, fear the Lord and the King; do not associate with those given to change" – Proverbs 24:21

Chapter 5: Introductory provisions

CONSULTATION QUESTION 5-1.

We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code:

(1) **must have regard to the development plan, so far as relevant to the exercise of that function; and**

(2) **must exercise that function in accordance with the plan unless relevant considerations indicate otherwise.**

Do consultees agree?

Number of responses

5.13 Total: 41 (32 in agreement, 7 equivocal responses, and 2 other).

Responses in agreement (without further comment)

5.14 PEBA, Institution of Civil Engineers Wales, Penstrowed CC, Caerphilly CBC; POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Torfaen CBC, Neath Port Talbot CBC, Bridgend CBC, National Trust, The Law Society, Monmouth TC, Pembrokeshire CC, Cardiff Council

Responses in agreement (with additional comment)

5.15 *Allan Archer:* I agree with the principle of the proposal that the s70 duty should be applied to the exercise by any public body of any functions under the planning code. However, the report indicates one function, the consideration of an application for a certificate of lawfulness, where it will not be appropriate to consider the development plan so the wording of 5.1 (1) should clearly allow for this and other (if there are any) instances where it is not appropriate. As to 5.1 (2), this includes the replacement of 'material' by 'relevant' but also appears to drop the words 'any other' from the s70 duty which I comment on further below. However, it also uses the word 'relevant' in both (1) and (2) which could be confusing.

5.16 *Ceredigion CC, POSW & Monmouthshire CC:* Agreed – see below for relevant debate. On the basis of the reasoning in the report, and to reflect what happens in practice, we would support the retention of the need to have regard to the Development Plan.

5.17 *UK Environmental Law Association:* We agree that the current state of the law with regard to the role of the development plan is unnecessarily complex and confusing. The proposed changes would, therefore, be very welcome.

5.18 *Carmarthenshire CC:* Agree. Support the retention of the need to have regard to the Development Plan in, and to extend this to, the exercise of all functions under the

proposed Planning Code. A further improvement would be to add to point (2) the word 'planning' so that (2) reads: "must exercise that function in accordance with the plan unless any other relevant planning considerations indicate otherwise.

5.19 *Lawyers in Local Government & Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services:* Yes. The current legislative requirement for the development plan to be the starting point for considering planning applications unless other relevant (currently material) considerations indicate otherwise needs to be carried across to the Code.

5.20 *Theatres Trust:* The Trust supports this proposed amendment, which should add certainty, clarity and prominence to the need to have regard to the relevant development plan and legislation regardless of the nature of the function presented to the planning authority or other decision making body.

5.21 *Janet Finch-Saunders AM:* I would call for further obligations to be placed on planning authorities to adhere to local development plans (LDPs) in terms of development – that is, to ensure all land allocated within an LDP is developed prior to external sites being approved for large scale housing developments. Such an obligation might help to prevent the practise of 'land banking'.

5.22 *Sirius Planning:* We support the proposal to explicitly require public bodies to have regard to the development plan when undertaking functions under the Code, as this will cement the role of the development plan in the planning process and foster collaboration on achieving its aims and objectives.

5.23 *Bar Council:* The Bar Council supports this drafting proposal, including the constituent elements sets out under Questions 5-2 and 5-3 below. There is merit in (i) the combination of the existing separated statutory provisions separate between two different Acts and (ii) the adjectival change to "relevant" considerations to bring the provision in line with administrative law (see further Q5-2(2) below). We would however recommend that those "functions" are clearly listed comprehensively (perhaps by Schedule), such that, in particular, those officers who exercise the applicable functions are aware of the duty, and compose their formal decisions or reports to councils and constituent committees accordingly (see further Q53 below).

5.24 *RTPI:* On the basis of the reasoning in the report, and to reflect what happens in practice, we would support the retention of the need to have regard to the development plan in, and to extend this to, the exercise of all functions under the proposed Planning Code. It is unclear why the consultation paper appears to have dropped the words 'any other' in the above question and paragraph 5.40 of the consultation document. We feel this addition would be an improvement to point (2) above, reading: "must exercise that function in accordance with the plan unless any other relevant planning considerations indicate otherwise.

5.25 *Keith Bush:* Agree – this would strengthen the status and effect of the development plan, by creating more certainty and consistency about decisions made by public bodies.

5.26 *Huw Williams (Geldards)*: Agree with the analysis that the development plan should be the primary consideration for any public body exercising a function under the proposed Code.

5.27 *Rhondda Cynon Taf CBC*: It is suggested that this is a sensible and clear approach to the consideration of planning applications.

Equivocal responses

5.28 *PINS:* In principle, this appears to be an improvement to existing legislation and the suggestion of signposting other legislation would be beneficial. However, does this proposal intend to extend the primacy of development plans? In reality, this would make little difference to current practices; however, this would be a significant change to the law and this approach could have an impact on public bodies.

5.29 *Huw Evans:* Whilst there is an important need to have regard to the development plan it must be on the understanding that the plan is up to date. Plan preparation time is notoriously excessive which means that the evidence base on which it has been prepared can be up to 10 years old by the time it is adopted. The requirement to review the policies and proposals of a plan seldom occurs other that through the annual housing land availability studies. Policies are not reviewed to test whether or not they are effective and yet, despite evidence presented on appeal, inspectors are nearly always make decisions in favour of policies which simply do not deliver what they set out to achieve. Legislation must make it clear that material considerations should be given substantially more weight where it can be demonstrated that a plan is failing to deliver and where it has not responded to changes in circumstances such as economic, retail and social trends.

5.30 *Home Builders Federation:* The HBF agrees with the proposed wording, subject to additional wording being included to the affect that this requirement applies only where the adopted plan is in date (the plan has not expired). This is particularly important as LDP's are now required to state an end date.

5.31 *Mineral Products Association:* We support the proposals in Question 5-1, noting the comments under paragraph 5.27 in relation to having regard to the Development Plan. Unfortunately, however, the process of delivery and review to provide up-to-date Development Plans remains a tortuous journey for local authorities, communities and developers alike. Unless coupled with a review of the contents of the plan and statutory requirements on deliver, this process will remain problematic. The clarity and simplification sought after, within the review of legislation needs also to look at the Development Plan process.

5.32 *Redrow Homes:* See response to Q. 5-2. [??]

5.33 *Pembrokeshire Coast NPA, National Parks Wales:* Agree in principle, however consideration would need to be given to how this would work in practice and the implications for plan making [see further comments below].

5.34 *Ceredigion CC, Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC:* Further consideration does however need to be given to how this would work in

practice and the implications for plan making, particularly in terms of the following points:

- The content of future development plans would need to reflect the duty to have regard to the development plan in exercising all planning functions where relevant. This may involve the need or expectation for specific policies and/or further details relevant to these functions within LDPs. LDPs may not currently contain policies of direct relevance to these other functions, which may have purposefully not been included as they would involve repetition of national policy or are covered by other legislation.

- In drafting LDP policies, consideration would need to be given to if and how the policies are intended to apply to different types of planning functions.

- The policy wording would need to reflect the type of function that it is aimed at i.e. policies may currently refer to 'development proposals', whereas certain planning functions do not involve 'development' as such.

- By widening the duty to have regard to the development plan, there is potential for confusion as to what may be considered to be relevant, particularly where certain planning functions are governed under other related legislation. Policies and details within LDPs would need to be drafted with this in mind and would need to be clear in terms of their relevance.

- Guidance will be needed to clarify the relationship between the policies of the LDP and the purpose and remit of each planning function, along with signposting to other related regulations.

- By way of an example, in respect of advertisement control, this function is carried out in the interests of amenity and public safety. Other matters cannot be controlled under this function, including the content of advertisements, however the relevance of policies relating to other matters may be misunderstood.

Other comments

5.35 *Association of Local Government Ecologists (Wales):* Whilst possibly not necessary to be included in the Bill further guidance could expand on the relationship between strategic/ local development plans and area statements produced under the Environment Act. Both will consider land use and identify key issues and priorities.

5.36 *Natural Resources Wales:* As a statutory consultee in the planning application process, we provide advice to the appropriate planning authority (decision-maker). The proposed new provision seems to relate only to the various decision-making functions of planning authorities set out in paragraph 5.20 of the consultation document. It seemingly does not relate to the advisory function of consultees which are set out in various legislation including the Development Management Procedure (Wales) Order 2012. Whereas NRW may have regard to or refer to provisions of a development plan in providing its advice, it should not be under a duty to do so. To

avoid potential confusion on the role of statutory/ specialist consultees with the role of determining authorities, we suggest that the proposed new text set out in Question 5-1 is amended by deleting: 'a public body' and replace with 'a determining authority'.

CONSULTATION QUESTION 5-2(1).

Note: questions 5-2(1) and 5-2(2) were a single question in the Consultation Paper, but many respondents answered them separately, so they have been analysed separately here.

We provisionally consider that to attempt to define relevant or material considerations in the Planning Code would cause as many problems as it would solve. Do consultees agree?

Number of responses

5.37 Total: 24 (21 in agreement and 3 in disagreement).

Responses in agreement (without further comment)

5.38 PEBA, Institution of Civil Engineers Wales, CLA, Ceredigion CC, Monmouth TC, Theatres Trust, Bridgend CBC, Canal & River Trust

Responses in agreement (with additional comment)

5.39 *Allan Archer:* I am inclined to agree with your conclusion that the principle outlined in Stringer as to the meaning of 'material consideration' is difficult to translate into a statutory provision. As a consequence, a proper understanding of this phrase would continue to need reference to case law (or other guidance outside the Code).

5.40 *Blaenau Gwent CBC:* Broadly agree. The danger of compiling a list that purports to cover all relevant considerations is that some will inevitably be left out. A list also doesn't deal with the issue of "weight".

5.41 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Lawyers in Local Government:* Yes, as almost anything is capable of being a relevant planning consideration depending on the specific facts, and the case law dealing with this principle is vast and often complex it is difficult to pin down in a statutory definition. As such, any list of potential relevant considerations could only be examples and there is the potential for a statutory definition to re-open disputes around what is and is not material in a particular case.

5.42 *Pembrokeshire CC:* Agreed. To attempt to define relevant or material considerations would cause as many problems as it would solve.

5.43 *PINS:* PINS agree, in that attempting to define material considerations in legislation is problematic. Our position has not altered since our first consultation response in 2016.

5.44 *The Law Society & Huw Williams (Geldards):* We agree with the analysis and conclusion in the consultation paper that "material considerations" should not be further defined

5.45 *Neath Port Talbot CBC:* Agreed – It is not possible to define material or relevant considerations as they will differ between sites and over time.

5.46 *Bar Council:* The Bar Council agrees that it is not possible as a matter of administrative law or practical reality to define the list of relevant or material considerations exhaustively. A list that is expressly defined as non-exhaustive would itself cause uncertainty and potentially generate unnecessary litigation.

5.47 *Newtown and Llanllwchaiarn Town Council:* Yes. The town council also considers that it would be helpful if a list of examples of what are not relevant considerations is set out to help the lay person.

5.48 *UK Environmental Law Association:* We recognise that the definition of a 'material consideration' in Stringer as 'anything related to the use and development land' might be perceived as unhelpful, but it does on the other hand clearly relay the need to consider a very wide breadth of issues. Without the addition of this 'definition' it might not be clear, particularly to a lay audience the importance of the very wide discretion of decision-makers in planning cases. However, we agree that any further attempt to define the term would be unhelpful.

5.49 *Planning Aid Wales*: Whilst agreeing specifically that "material (relevant) considerations" should not be defined (Question 5-2(1)), care will be needed when express reference is made to consideration of the likely effect, if any, of the exercise of planning functions on the use of the Welsh language (Question 5-5) and Welsh Government policy (Question 5-6). The absence of specific reference to other statutory duties (Question 5-8) and the different nature of the duty regarding historic assets (Question 5-4) means that overall the question of what is "relevant" may still be unclear.

Responses disagreeing

5.50 *Newtown and Llanllwchaiarn Town Council:* No. Town council would like to see clarity of the words 'any function'. More specifically it would like reference to the position of town & community councils in the planning process along with a better definition to whom the code applies. It is not clear whether this applies only to planning authorities or would include town & community councils as statutory consultees or when requesting variations to the development plan or when setting out pace plans which may be adopted as supplementary planning guidance.

Responses strongly disagreeing

5.51 *CMet Residents Group:* We strongly feel that "material considerations" should be defined in the new Code, the term "relevant considerations" gives applicants and local planning Officers the opportunity to ignore matters considered important in the local Community. We respectfully suggest the following wording could be suitable, which we mostly obtained from the Planning (England) Portal:

Material considerations can include (but are not limited to): overlooking / loss of privacy, loss of light or overshadowing, parking, highway safety, traffic, noise, effect on listed building, conservation area and historic assets, layout and density of building, design, appearance and materials, Government policy, disabled persons' access, proposals in the Development Plan, nature conservation and historic assets, Supplementary Planning Guidance (SPG's) produced and approved after Public Consultation by Local Authorities to help clarify aspects of the Local Development Plan.

We have added the items in italics to the Planning Portal's list and have found specific SPGs produced by Cardiff Council to be particularly relevant in our case when preparing objections, although in our case the Planning Officer's Final Report attempted to negate the effect.

We also strongly feel that a statement that sets out the fact that these material considerations should be a primary factor in deciding the acceptability of an application should be included in the Code for the benefit of all parties and in particular the layperson.

CONSULTATION QUESTION 5-2(2).

Note: questions 5-2(1) and 5-2(2) were a single question in the Consultation Paper, but many respondents answered them separately, so they have been analysed separately here.

We provisionally consider that the term "relevant considerations" would be more appropriate than "material considerations." Do consultees agree?

Number of responses

5.52 Total: 40 (17 in agreement, 11 equivocal responses, 11 in disagreement, and 1 other).

Responses in agreement (without further comment)

5.53 Institution of Civil Engineers Wales, CLA, Ceredigion CC, Monmouth TC, Bar Council, Canal & River Trust, Pembrey and Burry Port Town Council

Responses in agreement (with additional comment)

5.54 *PEBA:* Generally yes. We do however consider there to be a practical need for a provision which fulfils the function of section 56 of the TCPA 1990; and enables the developer and the local planning authority to judge against a stated set of principles whether the development authorised by the planning permission has been begun.

5.55 *Keith Bush:* Agree – "material" is ambiguous and difficult for lay people to understand. "Relevant" is also easier to convey bilingually, as "perthnasol" ["relevant"] easily conveys the same meaning as "relevant".

5.56 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government:* Lawyers in this area have worked with the concept of what is

and is not a material consideration for a long time and changing the name does not of course alter the principle. However, what is and is not "relevant" may be more readily understandable to others.

5.57 *Theatres Trust:* The Trust agrees. We consider it problematic to attempt to define relevant/material considerations because this could introduce unnecessary inflexibility which could inhibit the ability of decision makers to deal with emerging or unique circumstances, and to do so would add considerable length to the final legislation. The Trust agrees with this proposal.

5.58 *Pembrokeshire CC:* The use of 'relevant' considerations is agreed although for a consideration to be relevant there would need to be some 'material' impact.

5.59 *National Trust:* National Trust recognise the potential benefits of replacing the word "material" with the more every day word "relevant", but also recognise that this may lead to confusion and debate over what can be legitimately be considered as relevant. National Trust support the use of the word relevant but consider that the definition of 'consideration' (as set out in Stringer') should be incorporated to ensure that the term 'relevant consideration' is understood properly and not subject to a continued process of understanding, clarification and refinement.

5.60 *The Law Society & Huw Williams (Geldards):* We agree that the term "relevant considerations" is more appropriate and better accords with present day administrative law terminology.

5.61 *Neath Port Talbot CBC:* It would seem reasonable to refer to 'relevant considerations' rather than 'material considerations' on condition that this does not open the door to objectors wishing to oppose/challenge proposals/decisions on the basis of considerations which 'they' consider to be relevant as opposed to being relevant to planning.

5.62 *Andrew Ferguson:* Agree that whole of code should be subject to have regard to all 'relevant' considerations (rather than material considerations). However, given that this is a terminology change predominantly, it would be extremely useful to clarify that 'relevant' has the same meaning as 'material' did previously and therefore case law that has gone before is still relevant unless an issue is specifically excluded as a relevant consideration in legislation. This would also allow for future case law in England to be applicable in Wales rather than having to resolve similar disputes regarding the term relevant. Given that this is a terminology change to make the system more user friendly, it is queried why material is still intended to be used in terms of change of uses? Surely this should be updated as well to reduce confusion going forward as to what the distinction is between the two.

5.63 *UK Environmental Law Association:* We also agree that one of the key problems with planning law in its current state is the unnecessarily confusing and outdated nature of the language used. Therefore, we would welcome the proposal to change this term to 'relevant considerations'.

5.64 *Rhondda Cynon Taf CBC*: In respect of question 1 whilst it would seem in principle that a definition of what constitutes a material consideration would be helpful the scope of what can amount to a material consideration is very wide and would often

depend on the circumstances. It is therefore agreed that there should be no attempts define what is a material consideration in the Planning Code. In respect of 2 whilst relevant and material have the same meaning the word relevant is more readily understandable and clear and this suggestion is supported.

Equivocal responses

5.65 *RTPI:* We recognise that it is not obvious to all stakeholders what 'material' means, even to members of planning committees, sometimes little is understood about what 'material' is intended to cover. So to move to a more everyday word could make the concept more understandable. However, the purpose of including 'material considerations' into the legislation in the first place was simply to enable other factors in addition to the development plan to be considered. Changing the terminology does not change this or the parameters of what other factors can be legitimately considered.

The Oxford English Dictionary defines 'relevant as: "bearing on or having reference to the matter in hand", whereas it defined 'material' as "important, essential, relevant", providing added depth to the requirement.

Moving to 'relevant' may cause problems as it could be considered to be broader than the interpretation in *Stringer* intends it to be. This could cause greater ambiguity and therefore confusion/debate over what can legitimately be considered as relevant.

Planning professionals often take on the role of providing the necessary parameters of what 'material' is and there is a reasonable understanding of what is deemed to be 'material' and 'non-material' within the profession itself. Whatever term is used, learning and understanding this would still need to happen in relation to defining what is 'relevant' and 'irrelevant'. As this will vary depending on the circumstances of an individual planning decisions, changing the terminology will make little difference in practice and could potentially add a massive administrative burden. We question the difference this change would make in practice?

Consequently, if 'relevant' is to be prepared over 'material' then the definition of 'consideration' set out in Stringer' should be incorporated to ensure that the term 'relevant consideration' is understood properly.

Also see our comments in relation to question 5.1. The words 'any other' appear to have been omitted from the 5.1 and 5.2 proposals but included in 5.3. We would support the use of these words to retain the continuity of the provision.

5.66 *Pembrokeshire Coast NPA, National Parks Wales, POSW Wales, Cardiff Council & Monmouthshire CC:* Agreed use 'relevant' to distinguish from "material" change of use (see 7-5) and also material alterations as used in guidance on SAMs. There is concern that the change will be seen as changing the meaning and therefore there will be further debate as to the relevance of the new word. For clarity, whichever word is used the word 'planning' before material/relevant will assist.

5.67 *Allan Archer:* Changing 'material' to 'relevant' does not then change this situation as, to avoid misunderstanding the meaning of 'relevant consideration' in this context, it would still be necessary to refer to case law (or other guidance outside the Code).

Consequently, I do not see any real benefit in changing 'material' to 'relevant'. One other point is that the words 'any other' appear to have been omitted from the 5.1 and 5.2 proposals but included in 5.3. I would favour the retention of these words to retain the continuity of the provision.

5.68 *Blaenau Gwent CBC:* The substitution of "relevant" for "material" is not something I would object to but question whether the change has unforeseen consequences in terms of updating related legislation.

5.69 *Carmarthenshire CC:* Agreed. The courts interpret 'material' to mean 'relevant'. To the layperson, it is not obvious what 'material' means, so to move to a more everyday word should make the concept more understandable; However, the purpose of including 'material considerations' into the legislation in the first place was simply to enable other material planning factors in addition to the development plan to be considered when exercising functions in relation to the Code. Changing the terminology is not intended to change this or the parameters of what other factors can be legitimately be considered. Suggest adding the word 'planning' before 'relevant' as an aid to making the term clearer.

5.70 *PINS:* Would this be in keeping with a "material change of use" for example. The phrase 'material' is used in reference elsewhere and a change may confuse matters and complicate the system further.

5.71 *Huw Evans:* I do not see that replacing 'material' with 'relevant' makes a great deal of difference. Whatever the consideration is, it will always be an issue of interpretation and weight when it comes to decision making. 'Relevant' is more general and could actually cause more ambiguity and confusion in its interpretation as it effects a planning decision.

Responses disagreeing

5.72 *Merthyr Tudfil CBC:* Disagree – 'Material' is established, 'relevant' has a much wider interpretation and is not therefore an appropriate term.

5.73 *Caerphilly CBC and POSW South East Wales:* The use of the term 'material consideration' works well without any apparent problems at present. Would changing it to 'relevant consideration' make any difference? It may lead to litigation about the meaning of 'relevant' if it isn't defined, which admittedly would be difficult. There may be a risk of all WG policy being relevant because of the tendency to see the planning system as the tool to deliver everything, e.g. health qualities of food used to refuse planning permission for a café.

5.74 *Newport CC:* The existing definition of what is 'material' has been well debated and established through case law. To change the term now would likely open up another debate. English courts will continue to use the phrase 'material' so there should be consistency on this point.

5.75 *Redrow Homes:* Redrow feel that the term 'material considerations' is appropriately understood. The case law referenced in the consultation is up to 12 years old. It is not felt that a change to 'relevant considerations' is required and if anything would

cause confusion to a term already appropriately understood. It is a UK wide understood term.

5.76 *Torfaen CBC:* The use of the term 'material considerations' is universally accepted and there is already a considerable amount of case law on the subject. There are concerns that changing the term to 'relevant considerations' could generate new legal challenges which would not be beneficial.

5.77 *Central Association of Agricultural Valuers:* We do not believe that this would provide clarity. Material considerations is an established phrase with some weight of precedent and also suggests a greater impact and importance than relevant consideration. On balance we prefer the existing language, which many applicants and advisors are already familiar with. We agree that a definition may not prove helpful.

5.78 *Sirius Planning:* We are concerned that using a more familiar word will result in a superficial understanding of an established planning concept, unless accessible guidance is provided. Regarding the definition of what is a material consideration, we agree that this would be problematic, as it is ultimately a matter of fact and degree established by the decision maker. Online guidance – which is regularly updated – could refer to established case law on this (and other matters), to allow users to gain a better understanding of the concept.

5.79 *Mineral Products Association:* The reference to the use of "relevant considerations" as opposed to "material considerations" as cited in Question 5-2 is far from helpful. We believe the term "material consideration" remains the preferred term here and elsewhere in the document, as this term is well established and applies to planning legislation elsewhere within the British Isles. Making such a change has no effect other than change for changes sake. However, whichever term is applied, simply to suggest that any attempt to define the term would fall in to the "too difficult box" is shirking the purpose of the review and this point should be re-examined. We would however, agree that the requirements should apply to any public body exercising the function.

5.80 *Bridgend CBC:* No. Material planning considerations has been a longstanding concept in planning where practitioners, the public and Town/Community Councils have developed some understanding of the term and what can and cannot be considered by the Local Planning Authority in the determination of a planning application.

5.81 *Friends of the Earth Cymru:* We do not consider the change of the word material to 'relevant' as helpful, and we are unclear as to why the Law Commission proposes this given the extensive and long use of the word 'material' considerations in planning. We do not support a move to filter out considerations where the burden of proof lies with objectors.

CONSULTATION QUESTION 5-3.

We provisionally propose that a provision should be included in the Bill, to the effect that a public body exercising any function under the Code must have regard to any other relevant considerations. Do consultees agree?

Number of responses

5.82 Total: 34 (29 in agreement, 3 equivocal responses, 1 in disagreement, and 1 others).

Responses in agreement (without further comment)

5.83 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, CLA, Blaenau Gwent CBC, Carmarthenshire CC, Torfaen CBC, Keith Bush, Monmouth TC, POSW, Monmouthshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire Coast NPA, National Parks Wales, Pembrokeshire CC, National Trust, The Law Society, Allan Archer, RTPI, Lawyers in Local Government, Cardiff Council

Responses in agreement (with additional comment)

5.84 *PINS:* As above, this appears to be an improvement; however, the exact impact (financially or otherwise) is not clear.

5.85 *Sirius Planning:* We support the proposal to require public bodies exercising any function under the Code to have regard to material considerations. This will help to highlight other relevant agendas and the balancing exercise central to planning decisions.

5.86 *Bar Council:* The Bar Council supports this approach, subject to comprehensive listing of the relevant functions (as set out above under Consultation question 5-1).

5.87 *Bridgend CBC:* Yes - consultees in particular need to be reminded that their comments should be reasonably related to the scale of the development and relevant in all other respects.

5.88 *Huw Williams (Geldards)*: Agree that the Bill should provide for any public body exercising functions under the Code should have regard to any other material considerations.

5.89 *Rhondda Cynon Taf CBC*: Yes. It is a statement of one of the principles of planning law. If a matter is relevant to the application it must be considered. It makes it clear.

Equivocal responses

5.90 *Newport City Council:* Any new code should be consistent.

5.91 *Redrow Homes:* See response to Q. 5-2.

5.92 *Neath Port Talbot:* Please see response above in 5-3.

Responses disagreeing

5.93 *Newtown and Llanllwchaiarn Town Council:* No. Town council would like to see clarity of the words 'any function'. More specifically it would like reference to the position of town & community councils in the planning process along with a better definition to whom the code applies. It is not clear whether this applies only to planning authorities or would include town & community councils as statutory consultees or when requesting variations to the development plan or when setting out pace plans which may be adopted as supplementary planning guidance.

Other responses

5.94 *Natural Resources Wales:* As a statutory/specialist consultee in the planning application process, we provide advice to the appropriate planning authority (decision-maker). Paragraph 5.40 of the consultation document suggests that the proposed new provision seems to relate only to the various decision-making functions of planning authorities (as set out in paragraph 5.20 of the consultation document). It seemingly does not relate to the advisory function of consultees which are set out in various legislation including the Development Management Procedure (Wales) Order 2012. To avoid potential confusion on the role of statutory/ specialist consultees with the role of determining authorities, we suggest that the proposed new text set out in Question 5-1 is amended by deleting: 'a public body' and replace with 'a determining authority'.

CONSULTATION QUESTION 5-4(1), (2).

We provisionally propose that a provision or provisions should be included to the effect that:

(1) a body exercising any statutory function must have regard to the desirability of preserving or enhancing historic assets, their setting, and any features of special interest that they possess; and

(2) a body exercising functions under the Planning Code and the Historic Environment Code must have special regard to those matters.

Do consultees agree?

Note: the definition of "historic asset", which was the subject of questions 5-4(3) the Consultation Paper, is considered separately below, since many respondents answered it separately.

Number of responses

5.95 Total: 45 (34 in agreement, 6 in agreement subject to conditions, 2 equivocal responses, 2 in disagreement, and 1 other).

Responses strongly in agreement (with additional comment)

5.96 *SPAB, Chartered Institute for Archaeologists:* We strongly agree with the proposal to introduce a statutory duty

5.97 *Glamorgan Gwent Archaeological Trust:* We would welcome the inclusion in the introductory provisions,

5.98 *Society of Antiquaries of London:* we strongly support the proposal, as drafted, to require give statutory recognition to desirability of preserving or enhancing all designated historic assets and their settings, not least World Heritage Sites.

5.99 *The Law Society:* We agree that the duties relating to historic assets should be expressed in uniform terms as proposed and welcome the clarity this will bring.

Responses in agreement (without further comment)

5.100 PEBA, Canal & River Trust, Bridgend CBC, Neath Port Talbot CBC, Torfaen CBC, Institution of Civil Engineers Wales, Penstrowed Community Council, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth TC, Andrew Ferguson, National Trust, Lawyers in Local Government, Keith Bush, Cardiff Council

Responses in agreement (with additional comment)

5.101 *Theatres Trust:* The Trust agrees with these proposals and considers it vital that the preservation and enhancement of historic assets, their settings and any special features of interest is made a central pillar of the planning system through revised legislation, policy and guidance.

5.102 *Pembrey and Burry Port Town Council:* The Committee agreed that it would be sensible for any public body exercising any function in relation to any historic asset should have regard to desirability of preserving or enhancing the asset, its features or setting.

5.103 *Newport City Council:* Yes, this would ensure that impacts on historic assets are part of the decision process which will ensure they are protected.

5.104 *Institute of Historic Building Conservation:* We support the proposal in Consultation Question 5.4 to widen the statutory duties of S66 and S72 to cover any body carrying out any statutory function.

5.105 *Central Association of Agricultural Valuers:* We agree that the desirability and importance of preserving or enhancing historic assets and their settings should be objectively considered. In some cases the benefit provided by development should be able to outweigh the desirability of preserving a historic asset.

5.106 *Huw Williams (Geldards)*: Agree that the duties relating to historic assets should be expressed in uniform terms as proposed and welcome the clarity this will bring. Agree that the categories of historic assets may be augmented by the Ministers.

5.107 *POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC, RTPI:* This is acceptable although it would make more sense to switch the order of (1) and (2) to place the planning and historic environment functions foremost with the importance of 'special regard' and then have any other functions following.

5.108 *PINS:* PINS are in agreement with the proposals set out in relation to historic assets. However, is this duplicating the Planning (Listed Buildings and Conservation Areas) Act 1990?

Responses in agreement (subject to conditions)

5.109 *Pembrokeshire Coast NPA; National Parks Wales, Carmarthenshire CC:* Agree in principle to the need for regard to be given to all historic assets. However, further consideration should be given to the application of these provisions in practice, for instance:

- Provision (1) refers to 'any statutory function', however the scope of this is not clear as other proposals refer to planning functions, or functions under the Planning Code, such as in provision (2). Is this intended to include statutory non-planning functions set out under other legislation?

- The recent historic environment legislation and updated national planning policy along with best practice guidance published to support this should be noted, as they may not have been prepared with the above proposals in mind. Likewise, LDPs that have been drafted in light of this national legislation, policy and guidance, may not reflect the above provisions.

- By widening this statutory duty to apply to all historic assets as prescribed, this does not acknowledge the differing levels of statutory protection afforded to different types of historic asset. The special regard to be given to listed buildings and conservation areas would be applied equally to other historic assets that are afforded lower levels of protection by legislation. This could cause confusion in terms of the significance to be attributed to different types of assets. Therefore, further consideration should be given to the use of the word 'special' in proposed provision (2) in terms of whether it should apply to all prescribed historic assets.

- Provision (2) should be applicable in so far as it is relevant to the exercise of that function, in the same way that it is intended for the duties to have regard to the development plan and to the Welsh language to apply.

- The wording of the provisions (1) and (2) is notably different to other proposed provisions (for instance under 5-1 and 5-5) which may be intentional, however the reasoning for this is unclear.

5.110 *Allan Archer:* I support the proposal on the understanding that there will be no difference to the degree of weight and importance to be assigned to listed building and conservation area considerations as at present. I have never understood why s66 says 'special regard' while s72 uses the term 'special attention' and since there does not seem to be any difference in the interpretation of these different terms I do not see any objection to consolidation of the provisions using the term 'special regard'

(in proposal 5.4 (2)). However, I think it would make sense to switch the order of (1) and (2) to place the planning and historic environment functions foremost with the importance of 'special regard' and then have any other functions following.

5.111 *Historic Houses Association:* Yes, subject to several important amendments. First, it is essential that the term 'conservation' replaces the term 'preservation' in the statutory duties as currently drafted. This amendment would reflect the approach to the historic environment that Welsh Government adopted in Conservation Principles (2009) and the Wellbeing of Future Generations Act (2015), which champion 'conservation' not 'preservation'.

'Conservation' is the internationally-adopted best practice term reflecting the modern approach to heritage protection, which ensures a sustainable future for historic places through using them in ways that underpin their ongoing economic viability. Historic places are there to be used. Often the best way to save an historic building is to find a new use for it through enhancing what is significant about it and sympathetically adapting what is not significant, to help generate the income required to support the building's upkeep.

This positive approach to conservation provides a far more resilient future for historic places than the preservationist approach, which fails to achieve economic viability for heritage, and thereby fails to deliver effective heritage protection.

Secondly, the provisions should make clear that the regard/special regard proposed in the consultation document should be proportionate to the significance of the historic asset in question. This clarification will save time and money for both local authorities and applicants.

5.112 *CLA:* Yes, in general terms, though we question the importance of this given that the heritage significance of these is already a material consideration. The proposal needs amendment:

- Firstly, and most importantly, it is essential that the word 'preservation' is replaced in these statutory duties by the modern best practice term 'conservation'. The core of modern international conservation philosophy is its change of approach from 'preservation', with its message that change is inherently undesirable, to 'conservation', with its message of first identifying and then carefully nurturing what matters, and of allowing the asset to be changed sympathetically so as to remain relevant, appreciated, and used, and to produce (directly or indirectly) the flow of income needed to fund its (usually substantial) maintenance costs. This modern 'positive conservation' or 'resilience' approach has been so widely adopted internationally because it protects heritage much better than presumptions in favour of 'preservation', which are the antithesis of effective heritage protection. Cadw/Welsh Government of course adopted the 'conservation' approach at least a decade ago, in the 2009 Conservation Principles and elsewhere, and it is a key part of the Well-being of Future Generations Act 2015's 'resilience' approach, and planning and historic environment legislation should obviously follow this through.

- It should be clear that the duties/regards proposed above should be proportionate to the significance of the historic asset, because being told to give 'special regard' to something of little significance would be difficult to justify. For example, a listed building 'curtilage structure' is 'listed' purely by legal process, with no 'special interest' test, and may have little (or indeed no, or negative) heritage significance.

Equivocal responses

5.113 *Bar Council:* The Bar Council has no substantive observation on this proposal, save that the duty should be stated at the end of any initial section. We suggest that considerable care needs to be taken in drafting what are envisaged as introductory sections within the Bill, to ensure that the provisions are narrowly drafted, without multiple qualifications and exceptions. As the Consultation Paper suggests there is a risk of accretion in lists of applicable provisions, which can obscure the clarity of the most commonly encountered requirements.

5.114 *Rhondda Cynon Taf CBC*: It is submitted that whilst it is appropriate that it is made clear that a body must have regard to the desirability of preserving or enhancing historic assets it must be made clear that the duty is invoked when a decision affects the historic asset or its setting. At the moment the suggestion is too wide. In addition, there is a question of why the Historic Environment Code is referred to. This should be removed.

5.115 *Natural Resources Wales:* Our role as statutory/ specialist consultee in the planning system is set out in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended). Whilst the proposed new provision may be applicable to the decision-making role of planning authorities, it is not applicable to all consultees who are consulted for advice on a specialist matter (e.g. as set out in the Development Management Procedure (Wales) Order 2012). A similar duty already applies on NRW under Article 5D of The Natural Resources Body for Wales (Establishment) Order 2012, and duplication of this duty in planning legislation should be avoided as it could create ambiguity, particularly if there is a conflict or inconsistency between the two duties. We therefore suggest that 'a public body' is replaced with 'a determining body'.

Responses disagreeing

5.116 *Newtown and Llanllwchaiarn Town Council:* No. Town council would like to see clarity of the words 'any function'. More specifically it would like reference to the position of town & community councils in the planning process along with a better definition to whom the code applies. It is not clear whether this applies only to planning authorities or would include town & community councils as statutory consultees or when requesting variations to the development plan or when setting out pace plans which may be adopted as supplementary planning guidance.

Other comments

5.117 *Douglas Hughes Architects Ltd.:* So often we see LPAs and Heritage Officers adopt the position of preservation of listed buildings at all costs. This can often be at the expense of that listed building. In relation to opportunities to preserve or enhance the

asset, its features and its setting, we see these as a positive move forward in terms of the consideration of any listed building application.

CONSULTATION QUESTION 5-4(3).

Note: the proposed statutory duties relating to historic assets, that were the subject of questions 5-4(1),(2) of the Consultation Paper, are considered separately above, since many respondents answered them separately.

We provisionally propose that a provision or provisions should be included to the effect that … "historic assets" be defined so as to include world heritage sites, scheduled monuments, listed buildings, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe. Do consultees agree?

Number of responses

5.118 Total: 32 (26 in agreement, 2 equivocal responses and 4 in disagreement).

Responses in agreement (without further comment)

5.119 Allan Archer, Canal & River Trust, Bridgend CBC, Neath Port Talbot CBC, Torfaen CBC, Institution of Civil Engineers Wales, Penstrowed Community Council, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Andrew Ferguson, National Trust, Lawyers in Local Government, Keith Bush, Cardiff Council

Responses in strong agreement (with additional comment)

PINS: PINS particularly welcome the clarity in relation to the definition of 'historic assets'.

5.120 *Society of Antiquaries of London:* we strongly support the proposal, as drafted, to require give statutory recognition to desirability of preserving or enhancing all designated historic assets and their settings, not least World Heritage Sites.

Responses in agreement (with additional comment)

5.121 *PEBA:* Yes – it is, however, important that the definition of "historic assets" is clearly limited to those that have been recognised for their value through a formal designation. Otherwise the scope of the special duty will be uncertain and it will be seen to lack justification.

5.122 *The Law Society:* We agree that the categories of historic assets may be augmented by the Ministers.

5.123 *CLA:* Yes, in general terms. The definition of 'historic assets' suggested here is limited to officially-designated heritage, and should say that explicitly, because the definition of 'historic assets' used in Planning Policy Wales, TAN24, and Welsh Government/Cadw guidance is much wider, covering not only designated heritage

(designated historic assets) but also undesignated heritage (undesignated historic assets). (As a footnote, the TAN24 definition of 'historic asset' is poor, because it appears to set no lower threshold of heritage significance at all).

5.124 *Theatres Trust:* We also consider that non-designated heritage assets ought to be included within the prescribed categories of land, as such assets may carry local significance and positively contribute to their surrounding townscapes without meeting the necessary threshold for statutory protection.

5.125 *CMet Residents Group:* We would wish to add to the list of "historic assets": Local Wildlife Sites (SINC's) and Ancient Woodlands.

5.126 *Rhondda Cynon Taf CBC:* The definition of "historic assets" is acceptable but if the Welsh Ministers are given the ability to prescribe other categories of land in secondary legislation there must be a requirement that those assets are easily identifiable e.g. by a statutory list.

Equivocal responses

5.127 *Historic Houses Association:* Yes, subject to several important amendments. [The phrase] 'and such other categories of land as the Welsh Ministers may prescribe' is too open ended. The HHA would like to request greater clarification. We would urge specialist advice on this issue before making a decision.

5.128 *UK Environmental Law Association:* As an environmental organisation, UKELA notes that there is a need to consider more broadly how the 'special status' of 'historic assets' relates to the protection of our natural as well as our cultural heritage. This is an issue that is of particular relevance when considering the issue of landscape protection. The development of a new approach to planning in Wales provides the opportunity to give further thought to the way in which we can we provide more 'joined-up approaches' to such issues. More thought needs to be given to the impact of providing 'historic assets' with special status in planning law on our natural heritage (which may extend beyond current legal regimes for the protection of endangered flora and fauna).

Responses disagreeing

5.129 *Dyfed Archaeological Trust:* In this question the definition of 'historic assets' is rather narrow. A more complete definition is provided in the Welsh Government's Historic Environment Records in Wales: Compilation and Use. We recommend that the following should be added to the list of 'historic assets' provided in the question: conflict sites, historic landscapes, other areas or sites which local authorities or the Welsh Ministers consider to be of local historic, archaeological or architectural interest.

5.130 *Glamorgan Gwent Archaeological Trust:* We are concerned that the definition of historic assets is too narrow. We would suggest that the definition provided in the Welsh Government's Statutory Guidance Historic Environment Records and Use (2017) is used (see sections 3.2.1, 3.2.2, 3.2.4, 3.2.5 and 3.2.8, thus the definition should be extended to include conflict sites, other areas or sites which local authorities or the Welsh Ministers consider to be of local historic, archaeological or

architectural interest and need to reference the weight given to individual assets through their connection with historic landscapes (3.2.3), characterization (3.2.6) and historic place-names (3.2.8). We would also draw attention to sections 4.1 We would also draw attention to sections 4.1 , 4.2, 4.3 concerning the use of historic environment records in informing strategic policies and plans, in informing development plans, and in informing development management decisions.

5.131 *Chartered Institute for Archaeologists:* We strongly disagree with the proposal to define 'historic assets' 'so as to include world heritage sites, scheduled monuments, listed buildings, conservation areas, registered parks and gardens, and such other categories of land as the Welsh Ministers may prescribe'.

'Historic assets' are already defined (in paragraph 1.7 of TAN 24 The Historic Environment) as: 'An identifiable component of the historic environment. It may consist or be a combination of an archaeological site, a historic building or area, historic park and garden or a parcel of historic landscape. Nationally important historic assets will normally be designated' and it would be extremely unhelpful to provide a further, inconsistent, definition, on its face excluding undesignated assets. If it is envisaged that Welsh Ministers would prescribe undesignated assets, this would provide an unnecessarily circuitous means to arrive at the definition in planning policy. Consequently we support these duties in respect of the historic environment but wish to see 'historic assets' defined consistently with planning policy.

5.132 *Society for the Protection of Ancient Buildings:* We strongly disagree with the proposed definition of 'historic assets'. Historic assets are already defined in 1.7 of TAN 24 The Historic Environment and the proposed definition is not consistent with that definition. It would be extremely unhelpful to introduce a conflicting definition especially where that definition is less inclusive (omitting undesignated heritage assets) and less holistic (omitting the idea that a heritage asset can be one asset or a combination of many).

Responses strongly disagreeing

5.133 *Mineral Products Association:* With reference to paragraph 5.52 the term "historic asset" should clearly be defined. There is a danger that the level of protection afforded to a local "historic asset" could be the same as a world heritage site if this matter is not properly considered. In relation to Question 5-4, as referred to above, it is unacceptable to allow the term "and other such categories of land as Welsh Ministers may prescribe" to be enacted in the code. The definition must be clear and concise and not left open to wanton abuse. Similarly, "setting" is subjective and needs to be defined following open and informed consultation.

CONSULTATION QUESTION 5-5.

We provisionally propose that a provision should be included in the Bill to the effect that:

(1) **the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function**

under the Code, include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function; and

(2) **the duty to consider the effect on the use of the Welsh language is not to affect:**

- **whether regard is to be had to any other consideration when exercising that function or**

- **the weight to be given to any such consideration in the exercise of that function.**

Do consultees agree?

Number of responses

5.134 Total: 37 (30 in agreement, 5 equivocal responses, 1 in disagreement, and 1 other).

Responses in strong agreement

5.135 *Keith Bush:* Agree – the Welsh Government's language strategy "Cymraeg 2050" has important implications for land use, especially on the effect of development patterns on the sustainability of natural Welsh communities. Effective consideration of these implications must be secured as an integrated part of the planning process.

Responses in agreement (without further comment)

5.136 PEBA, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Monmouth Town Council, PINS, National Trust, Torfaen CBC, Bridgend CBC

Responses in agreement (with additional comment)

5.137 *Theatres Trust:* The Trust strongly supports the sustainable development principle outlined in paragraph 5.57 that public bodies must act to achieve "a Wales of vibrant culture and thriving Welsh language" [and] therefore agrees with the proposed provision to be included within the Bill.

5.138 *Rhondda Cynon Taf CBC*: There is no objection to these proposals.

5.139 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC:* Agree in principle, however planning policies and guidance at national and local level relating to the Welsh language are currently focused on assessing the impact of 'development' on the Welsh language. Clarification and guidance will be needed as to how the Welsh language should be considered in terms of carrying out other planning functions, particularly those that do not involve 'development' as such. In terms of advertisement control, for instance, whilst national policies local policies may encourage or expect signage to be bilingual, this cannot be enforced under the advertisement regulations as the content of advertisements is beyond control. Again, there is potential for confusion as to the relevance of policies to different types of planning functions.

5.140 *Allan Archer:* I think there is a distinction between the general Well-Being Act duty of public bodies to act so as to achieve "a Wales of vibrant culture and thriving Welsh language" and the more specific duty in the P(W)Act to consider as a relevant consideration the effects on the use of the Welsh Language so I agree on balance with the continued inclusion of a provision as proposed (including the essential caveats included) – otherwise I think the site/area specific considerations could be lost/glossed over.

5.141 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, on the basis that the purpose of the last element of the proposal (the duty to consider the effect on the use of the Welsh language is not to affect … the weight to be given to any such consideration in the exercise of that function) allows LPAs, in those areas where the use of the Welsh Language is by a minority of people, to generally give the matter less weight than where the language is more widely spoken. If that is not the case, the wording needs to be varied to reflect the varying use of Welsh across the country, and its relative importance as a relevant matter.

5.142 *Lawyers in Local Government & Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services:* Yes, but what other statutory requirements (over and above the ones referenced below) may need to be given specific reference in the Code (notwithstanding (2) above) and if any are not referenced does this have the potential to create disputes over the relative importance of any other such provisions? Is the qualification at (2) above and below sufficient to deal with this concern?

5.143 *Bar Council:* The Bar Council supports this proposal, on the basis that it would improve access to justice to those whose first or only language is Welsh. There is clear merit in including this within the text of the leading section, given the importance of the interest at stake.

5.144 *RTPI:* There is a distinction between the general Well-Being of Future Generations Act 2015 duty on public bodies to act to achieve "a Wales of vibrant culture and thriving Welsh language" and the more specific duty in the Planning (Wales) Act 2015 to consider as a relevant consideration the effects on the use of the Welsh language. The planning system has its role to play in securing a thriving Welsh language, however the approach will vary with different areas and contexts. The Welsh Government consulted on changes to Technical Advice Note 20 (TAN20) in April 2016. RTPI Cymru's response can be downloaded here [http://www.rtpi.org.uk/media/1755586/tan_20_final_response.pdf]. On balance, we agree with the continued inclusion of a provision as proposed, including the essential caveats.

5.145 *UK Environmental Law Association:* The proposed provisions on the Welsh Language appear to be appropriate and reflect the significance of its status to cultural issues that underline sustainable development in Wales which are also acknowledged in the Well-Being of Future Generations (Wales) Act 2015.

5.146 *Friends of the Earth Cymru:* In terms of the Welsh language, the Commission's proposal to have this duty on the exercise of any planning functions under the Code is useful; however, it will only have impact on the outcome if it carries weight both in terms of procedure and outcome. By this we mean that a local plan has to consider how it distributes development (putting it all in one commuter development tends to

undermine the Welsh language, having a distributed pattern of development that augments existing settlements, provides opportunities to enhance it) – the same considerations should apply at the point of decision-making on any particular development – and that consideration should be transparent and documented.

5.147 *The Law Society & Huw Williams (Geldards)*: Agree that this maintains the present position but in clearer terms. Consideration of the debates in the National Assembly on the Welsh language provisions in the P(W)A 2015 would tend to suggest that there is a case, at least in areas where there are strong Cymraeg speaking communities, for special regard to be had to the effect on the use of the language. This is on the basis that the language is a critical part of Wales' heritage. Suggest the draft Code provides a power for Ministers to designate areas where special regard should be paid.

Equivocal responses

5.148 *Welsh Language Commissioner:* As you are aware, the Welsh Language (Wales) Measure 2011 gives the Welsh language official status in Wales. Through regulations the Measure also requires public organisations to comply with specific duties, namely the Welsh Language Standards. There are 5 kinds of standards relevant to public authorities which are part of the planning regime, namely service delivery standards; policy making standards; operational standards; promotion standards and record keeping standards. Section 29 of the 2011 Measure provides that a "policy making standard" means a standard that relates to a policy decision, and is intended to secure, or to contribute to securing, that the person making the policy decision considers one or more of the following:

- what effects, if any, (whether positive or adverse) the policy decision would have on opportunities for people to use the Welsh language, or on treating the Welsh language no less favourably than the English language;
- how the decision could be taken so that it would have positive effects, or increased positive effects, on opportunities for persons to use the Welsh language, or treating the Welsh language no less favourably than the English language;
- how the decision could be taken so that it would not have adverse effects, or so that it would have decreased adverse effects, on opportunities for persons to use the Welsh language, or treating the Welsh language no less favourably than the English language.

In sections 5.92-5.113 you refer to other statutes that impose duties that are directly related to the exercise of functions under Planning acts. We believe that the policy making standards detailed in the Welsh Language Standards (No.1) Regulations 2015 are one of these relevant statutes. In consultation question 5-8 you propose 'that a series of signpost provisions to duties in nonplanning legislation that may be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance.' If there were an intention to do this we would encourage you to ensure that such ministerial guidance includes an explanation of

the relevance of the Welsh Language (Wales) Measure 2011 and the standards regulations relevant to planning legislation.

Sections 5.57-5.66 of the consultation paper

You state in 5.62 that the duty now to have regard to 'the effect of planning policy and decisions on the use of the Welsh language thus applies to the formulation of the National Development Framework and strategic and local development plans, and to the determination of planning applications'. In 5.65 you also state 'there seems to be no reason to limit the range of functions to which the duty applies'. In consultation question 55 you propose that a provision should be included in the Bill which states 'the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function under the Code, include the likely effect, if any, of the exercise of that function on the use of the Welsh language, so far as that is relevant to the exercise of that function' (my underlining). We welcome this proposal as we do not see any reason to limit the range of functions to which the duty applies. However, we believe the code should also specify the four areas named in 5.62 where there is also a duty to consider the effect of policies and planning decisions on the use of the Welsh language.

You will see above that the policy making standards go further than considering the effect of policies on the use of the Welsh language. We believe that considering the impact on 'the use of the Welsh language' as found in the Planning (Wales) Act 2015 is too limited and in legislation the wording in 5-5 should be expanded so that it is closer to the wording of the policy making standards. This would bring the requirement closer to the intention of the policy making standards and would align Welsh planning legislation with the Welsh Language (Wales) Measure 2011.

Data, evidence and research

At the moment there is a lack of data and evidence on the effect of planning policies on the Welsh language. More evidence on the effect of planning decisions would be a way of making more meaningful planning decisions as time goes on. There is no specific duty in the Planning (Wales) Act 2015 to monitor and collect evidence on the effect of policies and planning decisions on the Welsh language. During the Act's consultation period I asked for amendments to the Planning and Compulsory Purchase Act 2004 that would make it compulsory to conduct a Welsh language impact assessment in relation to local development plans. We have drawn the attention of the Cabinet Secretary for Energy, Planning and Rural Affairs to this matter recently. I know that it is not the intention of this exercise to propose changes to legislation which is already in force. However, if it were possible for you, in undertaking this consultation exercise, to consider a way of imposing a duty to investigate the effect of planning decisions I would welcome this.

5.149 *Neath Port Talbot CBC:* Neither Agree nor disagree – Why is it recommended in the section on material/relevant considerations that it is not possible to define what these are, yet we are defining that welsh language is a material/relevant consideration. It is fair to say that there are a number of issues covered under the Wellbeing of Future Generations Act which are enshrined in the planning system but are not necessarily prescribed. Welsh Language is already a material/relevant consideration in language

sensitive areas (in accordance with PPW and TAN20) and it is not considered necessary to prescribe it in legislation.

5.150 *Natural Resources Wales:* Our role as statutory/ specialist consultee in the planning system is set out in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended). Our statutory role does not extend to providing expert advice on the use of the Welsh Language when responding to planning application consultations. Whilst the proposed new provision may be applicable to the decision-making role of planning authorities, it may not be applicable to all consultees e.g. where they do not have a statutory duty to provide such advice. To avoid confusing the role of statutory/ specialist consultees with the role of determining authorities We therefore suggest that 'a public body' is replaced with 'a determining authority'.

5.151 *Andrew Ferguson:* Caution is required in this regard if, for example, advertisements are also to be included within the definition of development as the Welsh language should not be a relevant matter on the content of signage from a planning perspective. There could be unintended consequences as well if other subject areas are included within the definition and have to adhere to this duty.

5.152 *Owain Wyn:* That which concerns me the most is that there is a gap between the provisions and interpretations which persists between the wording of the Future Generations' Well-Being Act (which imposes a duty on public authorities to promote well-being (economic, communitarian, environmental and cultural) and the way in which it can be practically interpreted and implemented in the Planning (Wales) Act 2015.

The main focus of the cultural well-being goals is on the aim of creating a "Wales with a lively culture where the Welsh flourishes". The aim is described as a "community which promotes and protects culture, heritage and the Welsh, and which encourages people to contribute to the arts, sports and recreation." The sports and recreational activities also have their statutory framework for spatial planning in these areas. An example of this is the National Parks.

It is appropriate, therefore, to consider the need for a statutory framework with respect to spatial planning, to protect and improve the Welsh [Language]. The "health" of the Welsh Language is not consistent across Wales, and to secure a "community where the Welsh flourishes", it is acknowledged within the linguistic planning community that there is a need for different legislative, political and strategic framework for different parts of Wales, in order to [fix the stone to the wall]. The Welsh Government have acknowledged this in their Welsh 2050 strategy – "a million speakers", and are preparing a Bill to put abreast the Government, which aims to provide legislative support which is appropriate and up-to-date.

There are models to be seen in other countries. The Planning and Development Act 2000 and the Oireachtas' Gaeltacht Act 2012 in Ireland provide an example of ways in which consideration can be given to the relationships between linguistic planning and land use planning is done in Ireland.

Although I acknowledge that the planning system will not be the primary means of securing a Wales where the Welsh flourishes, there is a role for the planning and land

use system, and that this role will vary according to the emphasis (protect or improve) and importance according to the spatial context or area in question. E.g. the planning tools used in Caernarfon will likely be of a different kind to those used in Rhyl.

The starting point, then is that acknowledgement is needed, by standardising the two Acts, it is accepted that there is no need for a specific statutory provision to summarise the general aim of the planning system, but there is a need to be far clearer what the aims of the planning system from the perspective of protecting and promoting the Welsh language.

I would also argue that there needs to be a duty for public authorities (the Welsh Government as well as local planning authorities), when exercising their planning powers (implementing a development plan and when making a planning decision) to vary the weight on the effect on the use of the Welsh language according to the spatial and linguistic context. At present, there is a general impression that planning authorities are not confident that an appeal would be supported if a planning application were decided purely on the basis of its significantly injurious effect on the Welsh language.

TAN 20 acknowledges the concept of "areas of linguistic sensitivity" but there is no statutory support or comprehensive policy framework within the current system for this concept. I argue, therefore, that the Act needs to:

- Give statutory acknowledgement to the idea of areas of linguistic sensitivity;

- Give public authorities a duty, when implementing development plans or when making planning decisions, to give special consideration to the Welsh Language within these areas.

There is precedence to the concept of giving "special" consideration under the Listed Building Act 1990 to planning matters, when making decisions on listed building applications. Consideration should be given to extending the concept of "special consideration" to areas of linguistic sensitivity without necessarily giving precedence to consideration on the effect of the use of the Welsh Language in less sensitive communities.

Suggestions for a Reformed Planning Code. It is suggested, therefore, that suggestions for the Bill's provisions should be improved as follows:

- That the relevant considerations which a public body (the Welsh Government and/or local planning authorities) must consider when giving effect to any obligation under the code, include the likely effect, if there is any effect at all, of giving effect to this duty on the use of the Welsh Language, especially in areas of linguistic sensitivity, insofar as it is relevant to the exercise of that duty; and the

- Duty to consider the effect on the use of the Welsh Language is to not affect the following:

- Whether or not there is need to consider any other consideration when giving effect to that duty or

- the importance which should be given to any consideration of this kind when giving effect to this duty except the need to give special consideration to this effect in areas of linguistic sensitivity.

Responses disagreeing

5.153 *Institution of Civil Engineers Wales:* No. Care must be taken to ensure that Inclusion of this proposal does not have undesired consequences, e.g. permissions being refused for applicants speaking English, or indeed any other language. It could become a requirement under this proposal that certain towns or villages could be required by these means to speak a particular language. This is not a requirement of Planning legislation and if pursued may be seen to be an act of discrimination. Promotion of the Welsh language is a political matter. It is not a Planning consideration although the requirements of the Welsh Language Act and Well Being of Future Generations Act need to be followed.

Other comments

5.154 *Newtown and Llanllwchaiarn Town Council:* No. Town council considers that this question is not clear and should be put in plain language.

CONSULTATION QUESTION 5-6.

We provisionally propose that a provision should be included in the Bill, to the effect that:

(1) **the relevant considerations, to which a public body must have regard (in accordance with Consultation question 5-3) when exercising any function under the Code, include the polices of the Welsh Government relating to the use and development of land, so far as they are relevant to the exercise of that function; and**

(2) **the consideration of Welsh Government policies is not to affect:**

- **whether regard is to be had to any other consideration when exercising that function, or**

- **the weight to be given to any such consideration in the exercise of that function.**

Do consultees agree?

Number of responses

5.155 Total: 43 (41 in agreement, 1 equivocal, and 1 other).

Responses in agreement (without further comment)

5.156 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC; POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Monmouth Town Council, Theatres Trust, Home Builders Federation, Newport City Council, Torfaen CBC, Bridgend CBC, Barratt & David Wilson Homes South Wales, Cardiff Council

Responses in agreement (with additional comment)

5.157 *PINS:* As above, PINS are in agreement with this consultation question, and welcome the clarity in legislation this should provide.

5.158 *Pembrokeshire Coast NPA & National Parks Wales:* An important point is that this does not undermine the primacy of the development plan.

5.159 *Allan Archer:* The report sets out a clear rationale that this is effectively bringing into legislation what is established practice in relation to plan making and planning decision making and the principle established by the Courts. An important point is that this does not undermine the primacy of the development plan. Providing the proposal does not undermine this, I support the proposal with the caveats proposed.

5.160 *POSW; Neath Port Talbot CBC; Ceredigion CC; Pembrokeshire CC; National Trust Monmouthshire CC:* Yes, this is effectively bringing into legislation what is established practice in relation to plan making and planning decision making and the principle established by the courts. An important point is that this does not undermine the primacy of the development plan

5.161 *Carmarthenshire County Council:* Agree that this is effectively bringing into legislation what is established practice in relation to plan making and planning decision making and the principle established by the courts.

5.162 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes, but what other statutory requirements (over and above the ones referenced below) may need to be given specific reference in the Code (notwithstanding (2) above) and if any are not referenced does this have the potential to create disputes over the relative importance of any other such provisions? Is the qualification at (2) above and below sufficient to deal with this concern?

5.163 *Planning Aid Wales:* In relation to Qu 5-6 we consider that it would be helpful for "Welsh Government policy" to be clarified as meaning "PPW, TANs and Ministerial Statements". PAW favours an approach which signposts all steps in decision making, even if all details will not be included in the legislation.

5.164 *Andrew Ferguson:* Agree that PPW should be listed as a relevant consideration within the code. It would be useful to set out a list of various relevant consideration and also clarify what issues are not considered to be relevant considerations in general.

5.165 *Sirius Planning:* We support the proposal to include the policies of the Welsh Government in the list of material/relevant considerations increase transparency in decision making and remind local planning authorities/public bodies of the relevance

of national policy, especially when determining/commenting on applications of wider significance.

5.166 *Mineral Products Association:* Question 5-6 references "relevant considerations" and we refer to our comment above at 5-2. However, it may be worth including clarity on the weight to be given to Welsh Government Policy in the absence of an up-to-date Development Plan.

5.167 *The Law Society; Huw Williams (Geldards):* We agree with the proposal to make explicit reference to Welsh Government policy and that the primary means of expressing Welsh Government policy should be through the development plan. For the sake of clarity, especially for a lay reader, we propose that the reference to "function" should be amplified by adding "including, in particular functions relating to development plans". We also suggest that where a Minister intends a statement to be one of planning policy it must expressly state that it is a planning policy statement for the purposes of the Code.

5.168 *Bar Council:* The Bar Council supports this proposal, which is in principle a major benefit in the light of the absence of such a reference under section 38(6) of the Planning and Compulsory Purchase Act 2004 ('PCPA'). However two practical issues may arise, and merit detailed consideration with the Welsh Ministers and their respective civil servants.

First, it would seem important for the legislative provisions to define, soon after this provision, the full scope of qualifying documents that constitute the statutory development plan: see by contrast the structure of section 38 PCPA and the corresponding provisions in sections 15 and 17 PCPA, and the further regulations. Otherwise there is the risk that the definition of the "development plan" will continue to be obscure to lay readers.

Second, the final clause: "not to affect…the weight to be given to any such consideration in the exercise of that function" does appear to intrude upon an area which the Bar Council is aware is the subject of some controversy in respect of English national planning policy, namely the interaction between section 38(6) PCPA and the NPPF's paragraph 14: as summarised in *East Staffordshire DC v Barwood Developments Ltd & SSCLG* [2017] EWCA Civ 893.

In practice, both English and Welsh national policies frequently make directions as to where the "weight" to be given to adopted policies is affected either through express reference: PPW 2.14.4 " decreasing weight" to "outdated" Local Development Plan policies; NPPF 216: "the greater the weight" or through parallel concepts, e.g, the PPW presumption "in favour of proposals in accordance with the key principles (see 4.3) and key policy objectives (see 4.4) of sustainable development" and NPPF 14 "significantly and demonstrably outweigh" albeit that the ultimate degree of weight is always for the decision maker.

It is recognised that this situation is not free from difficulty, but, in principle, we suggest it may be clearer and better resolved by stating the duty positively: i.e. the decision-maker has full discretion as to the weight to be accorded to Welsh Government planning policies, subject to the duty to determine in accordance with the development plan, unless relevant considerations indicate otherwise.

5.169 *RTPI:* This is effectively bringing into legislation what is established practice in relation to plan making and planning decision making and the principle established by the Courts. An important point is that this does not undermine the primacy of the development plan. However, we appreciate that the development plan is not relevant in certain circumstances, such as Certificates of Lawfulness. Providing the proposal does not undermine this, we support the proposal with the caveats proposed.

5.170 *UK Environmental Law Association:* We agree that national policy has become a central consideration in all planning decisions and it should be clear that it is a relevant consideration in all circumstances.

5.171 *Huw Evans:* This is essentially what happens in practice and its inclusion in legislation is supported. It is important when giving weight to 'relevant material considerations' in decision making and identifying whether the development plan is properly up to date and reflecting government policy.

5.172 *Keith Bush:* Agree – it is an anomaly that the status of this policy is not given formal acknowledgement already under planning legislation.

5.173 *Rhondda Cynon Taf CBC*: Again this is a sensible solution that accords with the idea of codification. It makes clear that the decision maker must have regard to the appropriate policy documents issues by the Welsh Government. It also makes it clear that the weight to be placed on these policy documents is a matter for the decision maker.

Equivocal responses

5.174 *Newtown and Llanllwchaiarn Town Council:* No. Town council considers that this question is not clear and should be put in plain language.

5.175 *Natural Resources Wales:* Our role as statutory/ specialist consultee in the planning system is set out in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended). Our area of expertise and our statutory duties does not extend to providing expert advice on all matters to which Government policy may apply, and it would be confusing for new legislation to suggest otherwise.

The justification (paras 5.67 to 5.74) for the proposed new provision seems to relate only to the various functions of planning authorities, and does not seem to take account of advisory function of consultees who are consulted on specialist matters (as identified in various legislation such as the Development Management Procedure (Wales) Order 2012 (as amended). To avoid potential confusion on the role of statutory/ specialist consultees with the role of determining authorities, we suggest that the proposed new text set out in Question 5-6 is amended by deleting: 'a public body' and replace with 'a determining authority'.

We would also suggest that the Bill defines the term 'policies of the Welsh Government' by clarifying whether it extends to: Government strategies, plans, policies, Ministerial Written Statements and/ or Ministerial Oral Statements.

5.176 *John Almond:* Although Supplementary Planning Guidance is not mentioned I believe it should be retained and not included in planning law. They are, by definition,

extra instruments of advice to Planning Officers to assist in coming to a decision and allows him/her a degree of discretion. They are meant to be "aspirations" and aspirations cannot always be achieved. There must be many instances where desirable developments would not take place if planning regulations were strictly adhered to. We do not live in a totalitarian state where everything is seen only in black and white, individuality and freedom of thought and action are ruthlessly prohibited and everything must be done 'According to the book'. In a free democracy there must always be room for individual thought and freedom to make decisions according to special or extenuating circumstances.

5.177 *Planning Aid Wales:* PAW urges the Law Commission to take particular care to include appropriate references in primary legislation to the duty of Planning Authorities to ensure that plan-making and decision-making is carried out in the public interest and that public participation achieves effective engagement with all sections of the community.

5.178 *South Wales Police:* The Crime and Disorder legislation places clear obligations upon public bodies in Wales to consider crime and disorder issues and we would be keen to ensure that this is reflected in any future planning legislation in Wales

Other

5.179 *Merthyr Tudfil CBC:* Disagree – This shouldn't extend to things such as health policies e.g. proximity of A3 uses to schools etc.

CONSULTATION QUESTION 5-7.

We provisionally consider that it is not necessary for the Bill to contain a provision, equivalent to section 2 of the P(W)A 2015, to the effect that any public body exercising some of the functions under the Code must do so as part of its duty under the Well-being of Future Generations (Wales) Act 2015 to carry out sustainable development. Do consultees agree?

Number of responses

5.180 Total: 43 (27 in agreement, 7 equivocal responses, 9 in disagreement).

Responses in agreement (without further comment)

5.181 PEBA, CLA, Merthyr Tudfil CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Home Builders Federation, Newport City Council, Torfaen CBC, Bridgend CBC, Lawyers in Local Government

Responses in agreement (with additional comment)

5.182 *Natural Resources Wales:* We support the Law Commission's recommendation. Any attempt to replicate the provisions of the Wellbeing and Future Generations (Wales) Act 2015 into the Planning Code has risks of different parties having different interpretations unless such provisions are entirely consistent.

5.183 *Allan Archer:* I think, although it is bound to raise an eyebrow being such a recent legislative provision, that you have presented a cogent rationale for not carrying forward the Well-being cross-reference. I think you have demonstrated that cross-referencing and repeating duties already provided for in other legislation is neither necessary nor desirable (further elaborated in 5.110 – 5.113). However, these duties must be adequately highlighted and underlined in national policy and guidance. Were there to be a sustainability provision more specific and distinguishable from the general duty applying sustainable development to planning (similar to that relating to the Welsh Language) then that would be acceptable I think.

5.184 *POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC, RTPI:* The LC has presented a cogent rationale for not carrying forward the Well-being cross-reference. It has demonstrated that cross-referencing and repeating duties already provided for in other legislation is neither necessary nor desirable (further elaborated in 5.110 – 5.113). However, these duties must be adequately highlighted and underlined in national policy and guidance.

5.185 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, on the basis that there is no need to duplicate the duties of the Well-being of Future Generations (Wales) Act 2015 in the Planning Code.

5.186 *Blaenau Gwent CBC:* Agree. This in some ways harks back to the relevant considerations issue. Sustainability in all its forms is central to the planning system. There is nothing to be gained in restating any other legislative duties. One intended outcome is to reduce duplication and to simplify – the proposal is supported.

5.187 *Theatres Trust:* The Trust agrees with this proposal which would appear to remove from the future Bill any unnecessary duplication with the Well-being of Future Generations (Wales) Act 2015. However, it is important that the provisions within the Well-being of Future Generations (Wales) Act 2015 (or any future amendments) are retained and fully reflected within future Welsh planning legislation and policy.

5.188 *PINS:* Yes, it seems reasonable and appropriate that provisions relating to sustainable development remain in recent/relevant legislation.

5.189 *National Trust:* National Trust considers that cross referencing and repeating duties already provided for in other legislation are neither necessary nor desirable. However the duties must be adequately highlighted and underlined in national policy and guidance.

5.190 *Rhondda Cynon Taf CBC*: This is agreed. The duty set out in the Well-being of Future Generations (Wales) Act 2015 is one of many duties that an authority must comply with when making a decision. There is no need to replicate these duties in the Planning Code and the proposal as detailed in consultation question 5-8 would enable this amongst others to be identified.

Equivocal responses

5.191 *Royal Society for the Protection of Birds:* In Wales, as set out by the Planning (Wales) Act 2015, we strongly support exercising the planning function as part of carrying out sustainable development in accordance with the Well-being of Future Generations

(Wales) Act 2015, for the purpose of ensuring that the development and use of land contribute to improving the economic, social, environmental and cultural well-being of Wales.

5.192 *Pembrokeshire Coast NPA, National Parks Wales:* These duties must be adequately highlighted and underlined in national policy and guidance and more work needs to be done in this area. The PPW 10 consultation which is framed around WoFG is the way forward.

5.193 *Barry Town Council:* At the One Voice of Civil Engineers Wales Conference in September 2017 Barry Town Council proposed the following motion as they feel that there need to be better links with the Well Being of Future Generations Act 2011 – this would apply to CQ 5.7 of the consultation.

Motion – "One Voice Wales calls upon the Welsh Government to support and resource the development of a Community & Town Council Community Planning Model for Wales; the benefits would be twofold – it will support the role of Community & Town Councils contributing to the LDP system as well as enabling a consistent community planning methodology across Wales that will enable local councils to better support the Local Wellbeing Assessment requirements of the Well Being Act.

5.194 *The Law Society, Huw Williams (Geldards)*: I note that paragraph 5.7 notes the IAG's suggested statutory statement, which I played a part in drafting as a member of the IAG. At that time, the linkage between a planning bill and what eventually became the Well-being of Future Generations (Wales) Act 2015 was by no means clear. It was only after Royal Assent was given to the Planning (Wales) Act that the final shape of the Well-being Act emerged.

It is by no means clear to practitioners in the field of planning that there is a common understanding of the relationship between the planning system and the Well-being Act, with the office of the Future Generations Commissioner and how the two interact. Sustainable development has been a feature of planning policy and plan preparation for many years. As such it must be considered in the "planning balance" when planning decisions, particularly decisions on planning applications are considered.

However, arguments are being advanced that the Well-being Act duty replaces the balancing exercise with a duty to address all the "well-being goals". This approach, so far as I understand it, appears to be based on the statutory guidance issued under the Well-being Act, for instance paragraph 142 "Common Pitfalls" of SPSFG 1: Core Guidance, which states:

> "There is a hierarchy of well-being goals" — Only looking at one or two of the well-being goals, or interpreting a single goal as being of greater significance. This must be avoided. Public bodies must consider all seven of the well-being goals [See section 5 of this guidance to help you understand the contribution you can make]. It is important to understand that this is not about balancing impacts; it is working towards about win-win solutions and identifying the multiple benefits where they exist.

Planning appeal decisions in Wales also now routinely end with a broadly standard rubric, a typical example of which states:

"13. For the reasons outlined above, and having regard to all matters raised, I conclude that the appeal should be dismissed and the disputed condition should remain.

14. I have considered the duty to improve the economic, social, environmental and cultural well-being of Wales, in accordance with the sustainable development principle, under section 3 of the Well-Being of Future Generations (Wales) Act 2015 ("the WBFG Act"). In reaching this decision, I have taken into account the ways of working set out at section 5 of the WBFG Act and I consider that this decision is in accordance with the sustainable development principle through its contribution towards one or more of the Welsh Ministers well-being objectives set out as required by section 8 of the WBFG Act."

Due to the all-embracing nature of the Well-being duty I suggest that the Code should seek to make the relationship clearer and I think that the relationship should be addressed in the Act on the following basis:

- Determinations in accordance with a development plan (itself prepared by reference to the Well-being duty) should be assumed to discharge the decisionmaker's duty under the Well-being Act and be carrying out sustainable development, without the further need to apply the Well-being Act again at the level of individual planning decisions.

- As a corollary, if relevant considerations point to a decision other than in accordance with the development plan then the decision the Well-being Act will apply and it may be that this does not need to be explicitly stated in the Code for the reasons given in paragraphs 5.87 to 5.91.

5.195 *Pontypridd Town Council:* There is also a particular concern that the principles of the Wellbeing of Future Generations (Wales) Act 2015 are not being observed when planning decisions are made and proper and meaningful observance of the aims and goals of this legislation is urged.

Responses disagreeing

5.196 *Association of Local Government Ecologists (Wales):* we suggest that sustainable development should be clearly stated to be the underpinning principle of the planning process in Wales and it would make sense for this to guide development plan formulation in line with the definition in the WFG Act.

5.197 *Institution of Civil Engineers Wales:* No. As well as a requirement that sustainable development be undertaken, a further provision needs to be added here. When Planning legislation was first introduced by the TCPA of 1947, the intention of the Westminster government was that planning should be for the good of all, not just the applicant for a planning permission. This fact is recorded in Hansard which states (at volume 32 cc947-1075), that 'all the land of the country is used in the best interests of the whole people'. This fundamental principle has not been withdrawn by any subsequent legislation, so it remains a valid requirement and it should continue as a relevant consideration.

5.198 *Planning Aid Wales:* PAW considers that sustainable development is an important concept for Planning, and that Planning is a vital means of delivering sustainable development, as recognised by Part 2 of the Planning (Wales) Act 2015. As it has been included in Welsh planning law so recently, PAW suggests that the duty to promote and encourage sustainable development must be included in the Planning Code.

5.199 *Chartered Institute for Archaeologists:* No. Given the centrality of sustainable development to the planning system, we feel that such provision should be in the Code.

5.200 *Bar Council:* The rationale for this omission appears to be at odds with what we understand is one of the chief purposes of the Codification exercise, namely better presentation and simplification in order to enable the public to understand the planning system more readily as well as being comprehensive. We respectfully therefore recommend that the above proposal is re-considered. The duty to carry out sustainable development is an important one, and may not be well-understood by members of the public. In the Planning and Compulsory Purchase Act 2004, a similar duty is contained within the main text (albeit only in later provisions under section 39). The concept of "sustainable development" is also much-used in Welsh and English national policy and development plans. Given the importance of ensuring that the Code is comprehensive, we would suggest that there is real merit in re-stating the statutory duty.

5.201 *UK Environmental Law Association:* We do not agree that it is unnecessary for the Bill to contain a provision equivalent to section 2 of the P(W)A 2015. The arguments in favour of such a duty were debated during the passage of the P(W)A 2015 and involved a large number of stakeholders. UKELA were in favour of such a provision given the particular importance of land use planning to the achievement of sustainable development. We also suggested that this should be clearly stated as the purpose of planning. However, on balance we would suggest that this debate should be reopened by the Law Commission and the current provisions should be reiterated in the Code.

5.202 *Friends of the Earth Cymru:* We agree that the Welsh Government's planning policies should be specifically listed as matters of consideration. So should the principle of consultation on these policies. We agree that the WFG Act 2015 applies to all planning functions. But exercise of duties is different to setting out a purpose for planning, and therefore we think that the purpose of planning should be explicitly to achieve the well-being goals.

5.203 *Keith Bush:* Disagree – this would create uncertainty about the relevance of the Well-Being Act 2005 to the Planning Code.

CONSULTATION QUESTION 5-8.

We provisionally propose that a series of signpost provisions to duties in non-planning legislation that may be relevant to the exercise of functions under the Code should be included at appropriate points within Ministerial guidance. Do consultees agree?

Number of responses

5.204 Total: 37 (36 in agreement, 1 equivocal response).

Responses in agreement (without further comment)

5.205 PEBA, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth TC, Theatres Trust, Newport City Council, Torfaen CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, Institution of Civil Engineers Wales, CLA, Merthyr Tudfil CBC

Responses in agreement (with additional comment)

5.206 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC:* Yes, but has this got limitations with regard to being comprehensive, up to date. Example – Section 62 of Environment Act 1995. Policy/guidance is the relevant place for signposting and providing additional interpretation as to what they mean in practice in relation to planning decisions.

5.207 *Allan Archer:* I agree with this proposal. I think policy/guidance is the relevant place for signposting and providing additional interpretation as to what they mean in practice in relation to planning decisions.

5.208 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, for the same reason as set out in the last answer [there is no need to duplicate the duties of the Well-being of Future Generations (Wales) Act 2015 in the Planning Code].

5.209 *Association of Local Government Ecologists (Wales):* We welcome this section [C.Q.'s 5.6-5.8] and agree that the Bill should state that government policy is a material/relevant consideration as this will ensure that there is a clear and legal link between such policy and the planning process. This in turn will enable the planning process to deliver the relevant requirements of such policy, be it specifically planning related such as PPW or related to other topic areas partly reliant on the planning process, such as the Natural Resource Policy.

Whilst we agree that restated the duties set out in other legislation would not necessarily be helpful we would suggest that the definition of sustainable development used in the planning Bill should reflect that used in the WFG Act. As sustainable development should be the underpinning principle of the planning process in Wales it would make sense to make this explicit and marry any definitions to be in line with the WFG Act.

We agree that 'duties' contained in other legislation would not be useful to be listed in the Bill as they would become out of date. However, we would welcome a statement in the Bill clarifying that the duties form part of WG policy and should be material / relevant considerations, thereby ensuring a clear link between the planning legislation and other legal duties. It would be helpful if WG maintained an up to date list of the duties and this should be available on their planning website and via the Planning Portal. The relevance of the duties can be further explained and expanded upon in revisions of PPW and TANs as appropriate.

5.210 *Blaenau Gwent CBC:* Agree. This would be useful for practitioners and the public. However, the signposting should make it clear that these other provisions are separate to planning.

5.211 *Carmarthenshire CC:* Agreed. Policy/guidance is the relevant place for signposting and providing additional interpretation as to what other legislation mean in practice in relation to planning decisions.

5.212 *PINS:* This seems an appropriate proposal, however, for this to be beneficial to users of the legislation and in order to provide clarity, it would be reasonable if this guidance was produced and published alongside the legislation, or if that is not possible, without much delay.

5.213 *Chartered Institute for Archaeologists:* Yes. There may, however, be another related issue as regards principles of EU law which may no longer be directly applicable after Brexit. These include the polluter pays and precautionary principle and it would be helpful expressly to embody these in the Planning Bill.

5.214 *National Trust & RTPI :* National Trust supports this proposal. Guidance is the relevant place for signposting and providing additional interpretation as to what is meant in practice in relation to planning decisions. Sufficient funding should be made available to assist the production of and interpretation of guidance (training, workshops, briefings etc).

5.215 *Sirius Planning:* We agree reference to specific non-planning legislation in the Bill would expose it to becoming quickly out-dated. We also agree with the proposal to include a list of such legislation within regularly updated Ministerial Guidance, to raise awareness of relevant duties.

5.216 *The Law Society & Huw Williams (Geldards):* We agree with this proposal, particularly in view of the Welsh Government response to Law Commission No 366 Report on the Form and Accessibility of the Law Applicable in Wales that regulations and statutory guidance should stand a part of the Code.

5.217 *UK Environmental Law Association:* The duties in relation to protected landscapes are currently subject to consultation as part of the process considering measures to support the sustainable management of natural resources. The relationship between these and the Countryside Act 1968 may also need to be considered further as well as that of the biodiversity duties under the Environment (Wales) Act 2016. In the circumstances it would seem entirely appropriate to adopt the approach suggested of signposting provisions to duties in non-planning legislation within Ministerial guidance.

5.218 *Natural Resources Wales:* Yes, we agree with the proposed approach to include sign-post provisions to help users navigate around relevant aspects of the Code.

5.219 *Rhondda Cynon Taf CBC*: Yes this is supported. Whilst there is no need to set out in the new Planning Bill the duties in non-planning legislation that may be relevant to the exercise of planning functions a reference to those functions in Ministerial guidance would be helpful and a useful reference tool.

Equivocal response

5.220 *Bar Council:* The Bar Council's view is that the reference to "signposting" is not entirely clear and may also frustrate the overarching aim of codification – as this would make the provisions vulnerable to changes in the Ministerial guidance. We would recommend that further consideration is given to how these duties might be contained in a document with greater formal permanence, such as the inclusion within a Schedule to the main statute.

CONSULTATION QUESTION 5-9.

We provisionally propose that section 53 of the Coal Industry Act 1994 (environmental duties in connection with planning) should be amended so that they no longer apply to Wales. Do consultees agree?

Number of responses

5.221 Total: 32 (33 in agreement, 1 equivocal response and 2 in disagreement).

Responses in agreement (without further comment)

5.222 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Monmouth Town Council, Pembrokeshire CC, PINS, Newport City Council, Torfaen CBC, The Law Society, Bridgend CBC, Keith Bush

Responses in agreement (with additional comment)

5.223 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, this is adequately covered by other legislation, policy and guidance.

5.224 *POSW, Monmouthshire CC, Carmarthenshire CC:* This appears to be aimed at those formulating proposals for coal mining, restoration and other operations, not the local planning authority. Local planning authorities may want these provision to continue to apply to applicants and operators.

5.225 *Ceredigion CC:* Agree that section 53 (2) duplicates existing legislation. Section 53 (3) is aimed at those formulating proposals for coal mining, restoration and other operations, not the local planning authority, local planning authorities may want these provisions to continue to apply to applicants and operators. May also want to consider the desirability of widening the application of section 53 (3) of the Coal Industry Act to apply to other (non coal) mining operations, such as metalliferous mining and restoration.

5.226 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* We have not come across scenarios in practice that would cause an issue but understand the POSW have concerns about this issue. They have provided details of this in their responses.

5.227 *Neath Port Talbot CBC:* Agreed – The mineral developers should be required to have the same regard to 'relevant considerations' when designing their proposals as any other developer and as such there is no requirement for duplication in the legislation.

5.228 *RTPI:* These requirements should be already a requirement inherent in a planning application and therefore covered by planning legislation and we would therefore not have an issue with this proposed amendment.

5.229 *Huw Williams (Geldards)*: Agree section 53 of the Coal Industry Act 1994 adds nothing and should no longer apply in Wales.

5.230 *Rhondda Cynon Taf CBC*: Yes, as stated in the consultation the duty as set out in 53 is effectively required by the requirement to take into account all relevant considerations and so agree with the proposal that it no longer applies in Wales.

Equivocal responses

5.231 *Allan Archer:* It seems to me that this section is mostly aimed at those companies formulating proposals for coal-mining (s54 (1) and (3) and I think this serves a useful purpose in the public interest, in the context of the powers conferred on the Coal Authority to license coal-mining operations. These subsections are not duplicating provisions in the planning act and I think are worth retaining as duties on Coal Authority licensees (there would need to be some change to wording if s54 (2) were to be excluded). Whether it is necessary to impose a duty in the terms of s54(2) on planning authorities is I agree more questionable and I accept that it would be inconceivable that planning authorities would not have policies on the matters set out in s54(2)(a).

Responses disagreeing

5.232 *Chartered Institute for Archaeologists:* No. The logic of the report may be correct, but removing this duty in Wales (particularly when it refers expressly to archaeological interest) may be seen by some as a lessening of protection and as such would undermine clarity.

5.233 *Barry Town Council:* Barry Town Council do not agree with this question. They raised concerns over the fact that there are still open and cast mines in operation in Wales and therefore feel that this should not be amended to no longer apply to Wales.

CONSULTATION QUESTION 5-10.

In light of the previous proposals in this Chapter, we provisionally consider that there is no need for the Bill to contain a provision explaining the purpose of the planning system in Wales. Do consultees agree?

Number of responses

5.234 Total: 35 (26 in agreement, 2 equivocal responses, and 7 in disagreement).

Responses in agreement (without further comment)

5.235 PEBA, Penstrowed Community Council, CLA, Merthyr Tudfil CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Bridgend CBC, Lawyers in Local Government

Responses in agreement (with additional comment)

5.236 *Pembrokeshire Coast NPA, National Parks Wales:* Agreed. Governments of different political persuasions may have different views too on the purpose of planning so there could be scope for regular changes.

5.237 *POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC, National Trust, RTPI and Allan Archer:* Agreed. The inclusion of a statutory purpose is not necessary, and could introduce duplication, conflict and confusion. A definition of the purpose of planning could be the subject of much debate and differences of opinion on the detail of the wording as well as principles. Also, Governments of different political persuasions may have different views too on the purpose of planning so there could be scope for regular changes.

5.238 *Blaenau Gwent CBC:* Agree assuming that the purpose will be stated in related policy documents.

5.239 *Carmarthenshire CC:* Agreed. Coming up with a definition of the purpose of planning could be the subject of much debate and differences of opinion on the detail of the wording as well as principles – leading to agreement on something which would be so general as to be of little use.

5.240 *Newport City Council:* Yes, this should be explained in Policy documents.

5.241 *The Law Society; Huw Williams (Geldards):* We agree. In addition, further clarity will be introduced in any event if the Code has an overview section at the outset: see for example section 1 of the Planning (Wales) Act 2015.

5.242 *Neath Port Talbot CBC:* Agreed. The inclusion of a statutory purpose is not necessary, and could introduce duplication, conflict and confusion. A definition of the purpose of planning could be the subject of much debate and differences of opinion on the detail of the wording as well as principles. Also, Governments of different political persuasions may have different views too on the purpose of planning so there could be scope for regular changes. This should be defined in Planning Policy Wales rather than in legislation.

5.243 *Rhondda Cynon Taf CBC*: Whilst initially it does seem that a provision explaining the purpose of the planning system in Wales would be useful when you consider the proposals as detailed above of setting out in the Code the requirements to have regard to the Development Plan and other relevant considerations etc there is no requirement for an additional statement on its purpose.

Equivocal responses

5.244 *PINS*: There could be an advantage to explaining the purpose of the planning system, however, any explanation could be scrutinised by users (such as the public) and a greater emphasis placed on factors outlined.

5.245 *Torfaen CBC:* It's not necessary, but maybe a general broad definition of the purpose of planning would give the code a context.

Responses disagreeing (without further comment)

5.246 *Institution of Civil Engineers Wales:* No.

Responses disagreeing (with additional comment)

5.247 *Bar Council*: The Bar Council recognises the concern in respect of having a formal provision within the Bill setting out of the statutory purpose of the planning system on the basis of possible conflict. Such provisions are a routine feature of planning and land use legislation in civil law jurisdictions, e.g. the French Code de l'Urbanisme (Art L 101-2) and the German Baugesetzbuch (II-1-1).

In the UK context, however, there is less universal agreement on the core purposes of planning. These are multifarious, and ultimately dependent upon the nature of any given development proposal and its impact both negative and positive. The Bar Council understands that such purpose is a matter for the relevant national body to set out

We do not agree though that the type of section as proposed in 5.120 would necessarily "encapsulate" the statutory purposes as suggested at 5.121 of the PLW Consultation. This is because this proposed provision makes no reference to key national planning matters, e.g. the provision of sufficient housing. It would therefore be necessary in our view for the attendant national policy to set out clearly the overarching purposes.

5.248 *Radio Society of Great Britain:* A statutory purpose for planning. The RSGB considers that a statutory purpose should be included 'on the face of the Bill' and that it should be worded along the lines of that given in paragraph 5.5 in the paper. The reason is that it appears to be forgotten by many that the purpose of planning is IN THE PUBLIC INTEREST. It is not its purpose to protect private interests. All too often, planning applications for amateur radio antennas are being refused on the basis that they will 'harm the outlook' from a neighbour's property. The Courts have long held that no-one has the right to a view across adjoining privately owned land. Simply because a neighbour does not like the look of the aerials next door is not a direct effect on their living conditions, such as loss of privacy through overlooking or from overshadowing.

5.249 *Chartered Institute for Archaeologists:* No. In some quarters throughout the United Kingdom the primary purpose of the planning system is seen to be the delivery of economic development, and housing and planning is increasingly seen as an unnecessary clog on development. Reiteration of the purpose of the planning system in Wales would be helpful to make clear that the achievement of sustainable

development in the public interest (which involves balancing environmental, social and economic interests) is the primary objective of the planning system.

5.250 *Newtown and Llanllwchaiarn Town Council:* No. Town council is of the view that many people do not understand the purpose and scope of the planning system in wales and that there is a need for explanation of the purpose of the planning system.

5.251 *Keith Bush:* Disagree – although the drafting of a general statement about the purpose of the planning system is a difficult and complex task, the absence of any such statement in the current legislation creates confusion, and contradicts the principle that the purpose and scope of legislation, especially legislation as important as the Planning Code, should be clear and transparent.

5.252 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Would a broad definition of the purpose of planning give the code a context, e.g. the management and delivery of development in the public interest in a sustainable manner that takes account of its impact on people, heritage and natural assets, and other material considerations. The danger of any definition is that it is open to dispute, but is it better to have one than to have the planning system exist in a vacuum?

CONSULTATION QUESTION 5-11.

We provisionally consider that persons appointed by the Welsh Ministers for the purpose of determining appeals, conducting inquiries and other similar functions should be referred to in the Planning Code as "inspectors" or "examiners", but in either case in such a way as to make it clear that this does not prevent the Welsh Ministers appointing for a particular purpose a person other than an employee of the Planning Inspectorate. Do consultees agree, and if so which term do consultees think is most appropriate?

Number of responses

5.253 Total: 36 (22 in agreement, 12 equivocal responses, 1 in disagreement and 1 other comment).

Responses in agreement (without further comment)

5.254 Merthyr Tudfil CBC, Neath Port Talbot CBC

Responses in agreement (with additional comment)

5.255 *PEBA:* Yes – "inspectors" seems most appropriate as it is the most widely used and understood term in practice.

5.256 *Institution of Civil Engineers Wales:* Yes. "Inspectors" preferred.

5.257 *Blaenau Gwent CBC:* It is considered "Planning Inspector" is the most appropriate and widely accepted terminology in Wales.

5.258 *Carmarthenshire CC:* In relation to PINS – keep the reference as Inspector.

5.259 *Ceredigion CC, Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC:* 'Inspector' – public are mainly unaware of where these individuals come from anyway.

5.260 *Allan Archer:* I agree with this proposal and think that the term 'Inspector' should continue to be used – I see no compelling reason to change.

5.261 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government:* Yes. Inspectors, just because this has been the term used historically so carries familiarity with it and terms such as "examiners" does not appear to be obviously more appropriate.

5.262 *Monmouth Town Council:* The committee agrees and prefers the term "Inspectors".

5.263 *Pembrokeshire CC:* Agree – Inspector would be most appropriate.

5.264 *Newport City Council:* Yes, Inspector is the modern recognised term.

5.265 *Sirius Planning:* We support the proposal as we consider it would be more transparent to use a familiar title rather than 'persons appointed'. 'Inspectors' would be preferable.

5.266 *Mineral Products Association:* we would suggest retention of the title "Inspector".

5.267 *Bar Council:* The Bar Council suggest that the retention of the singular term "Inspector" would be clearer. This reflects the most common position, and avoids the confusion that can arise in the neighbourhood plan context in England, where the term "Examiner" is used instead. If the term "Examiner" is to be used, the status should be very tightly defined.

5.268 *RTPI:* We assume that the term 'inspectors' would be more universally understood in the context of the role.

5.269 *Friends of the Earth Cymru:* The Inspectorate should be established as a separate body for Wales. There are numerous occasions where Inspectors working in Wales do not differentiate sufficiently between the English planning policy system and the Welsh planning policy system. Clear blue water between the two agencies is required given the system is now so divergent in terms of overall direction. Referring to inspectors as examiners could be confusing given the different recruitment and experience profile of NSIP examiners.

5.270 *Huw Williams (Geldards)*: Agree. Planning Inspector is a designation with a lengthy history, although the meaning of the term in common usage does not reflect the quasi-judicial function of the present-day role. In most situations "decision-maker' is an accurate description which also accords with administrative law practice. However, in a small number of cases the Inspector will be reporting to the Minister who is the decision maker. The role is therefore most accurately described as "decision-maker or reporter". However, this seems compendious. A term that seems to cover both these roles and which seems more aligned to the actual role is "Assessor", in the sense that they would assess the evidence and either make a decision or make a report with a recommendation.

5.271 *Rhondda Cynon Taf CBC*: Agreed. The term examiner is most appropriate. It describes their duty which is to examine the acceptability of the proposals.

Equivocal responses

5.272 *Keith Bush:* Agree – "examiner" is an old-fashioned term and "examiner/inspector" would better reflect the nature of the role.

5.273 *Penstrowed Community Council:* Yes. Have no preference for which term is most appropriate.

5.274 *Torfaen CBC, Caerphilly CBC, POSW South East Wales, Cardiff Council:* Yes, but there is no preference about their title.

5.275 *CLA:* Yes. Inspectors or examiners depending on the circumstances.

5.276 *Theatres Trust:* The Trust agrees with this proposal, but has no preference as to the most appropriate term.

5.277 *National Trust:* Support for consistent reference to "inspectors" or "examiners" which would be more universally understood in the context of the role.

5.278 *The Law Society:* We agree. Planning Inspector is a designation with a lengthy history, although the meaning of the term in common usage does not reflect the quasi-judicial function of the present-day role. In most situations "decision-maker" is an accurate description which also accords with administrative law practice. However, in a small number of cases the Inspector will be reporting to the Minister who is the decision maker. The role is therefore most accurately described as "decision-maker or reporter". However, this seems compendious. A term that seems to cover both these roles and which seems more aligned to the actual role is "Assessor", in the sense that they would assess the evidence and either make a decision or make a report with a recommendation.

5.279 *Bridgend CBC: Yes* – "Inspectors" for Appeals and "Examiners" for Development Plans to clarify the distinction between the two roles.

Responses disagreeing

5.280 *PINS:* No, this suggested change is not necessary. PINS do not consider amending current wording would be desirable. By amending the current wording to 'an Inspector appointed' or 'an examiner appointed' this could remove the ability for PINS to appoint planning officers to conduct some types of casework (Non-Validation Appeals for instance).

Should legislation remove the ability for PINS to appoint planning officers to make decisions, this would cause major problems for the Inspectorate. These implications would be financial and related to resource management.

Furthermore, this would likely further differentiate wording to legislation in England, which may cause issues for PINS as a whole, and not just in Wales. At present the Inspectorate operates cross-border in both England and Wales, and so any changes would likely be felt in both areas.

As is alluded to in the consultation paper, should PINS Wales eventually become a separate agency, then this might be an appropriate juncture to amend wording in legislation, however, at this present time this is not wanted or needed by PINS.

Other comments

5.281 *RTPI Cymru:* We believe that there is some future potential work to be done in looking at the Planning Inspectorate and its set up and operations in Wales. While we do not think this should impact or hold up this work, we wanted to take the opportunity to raise this for the future

CONSULTATION QUESTION 5-12.

We provisionally propose that the Bill should not include the provisions currently in the TCPA 1990 enabling enterprise zone authorities, urban development corporations and housing action trusts to be designated as local planning authorities. Do consultees agree?

Number of responses

5.282 Total: 33 (29 in agreement, 4 in disagreement).

Responses in agreement (without further comment)

5.283 PEBA, Penstrowed Community Council, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Newport City Council, Torfaen CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, Cardiff Council

Responses in agreement (with additional comment)

5.284 *Institution of Civil Engineers Wales:* Yes. But see further comment on Urban Development Corporations at 16-10 below.

5.285 *POSW, Monmouthshire CC, Ceredigion CC, Neath Port Talbot CBC:* Agreed – not used, and now duplicated by fiscal enterprise zones which will create confusion.

5.286 *Pembrokeshire County Council:* Agree – not used, and now duplicated by fiscal enterprise zones which would create confusion.

5.287 *The Law Society:* We agree and see no merit retaining these provisions because of a possibility they might be used in the future. It is unlikely that future policy initiatives, albeit they might involve approaches like the ones noted, would be the same in all respects - so the need for adaptation of the legislation should be regarded as almost inevitable. Once this is acknowledged there isn't a great saving from having to legislate "from scratch". That being the case, the balance of advantage lies with removing these provisions and reducing the length of the Code.

5.288 *Bar Council:* The Bar Council agrees with this removal, which simplifies the statutory text and reflects the correct position at law.

5.289 *Friends of the Earth Cymru:* We agree that only local planning authorities and national park authorities should be designated planning authorities, and the unitary system lends itself to the simpler terminology of 'planning authority'.

5.290 *PINS:* This would not appear to impact on the work of PINS, though it seems reasonable and appropriate.

5.291 *Huw Williams (Geldards)*: Agree. I see no merit retaining these provisions because of a possibility they might be used in the future. It is likely that future policy initiatives, albeit they might involve approaches like the ones noted, are unlikely to be the same in all respects, so the need for adaptation of the legislation should be regarded as almost inevitable. Once this is acknowledged, there isn't a great saving from having to legislate "from scratch". That being the case, the balance of advantage lies with removing these provisions and reducing the length of the code.

5.292 *Rhondda Cynon Taf CBC*: Yes this is agreed as none of these have been set up in Wales as a local planning authority.

Responses disagreeing

5.293 *Accessible Retail:* We oppose this recommendation. The first two were established to promote development where the challenge to development/ regeneration was considered to be beyond the capacity/capability of local authorities and/or where special support measures were needed. They are proposed for abolition because they have not been used in Wales. That is not to say they might not be needed in the future as the processes of securing regeneration become more and more difficult. It is noteworthy that Scotland seems to be going in the opposite direction (e.g. the consideration of SPZs). Leaving them on the statute book maintains these options for Wales.

5.294 *Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC:* Do not agree. WG needs to keep its options open – there could well be a date in the future where to designate a LPA to undertake a new town for example would be necessary

CONSULTATION QUESTION 5-13.

We consider that the term "planning authority" should be used in the Planning Code in place of the term "local planning authority" and "minerals planning authority" in existing legislation. Do consultees agree?

Number of responses

5.295 Total: 44 (33 in agreement, 2 equivocal responses, 4 in disagreement, and 5 others).

Responses in agreement (without further comment)

5.296 PEBA, Penstrowed Community Council, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, National Trust, Torfaen CBC, Sirius Planning, The Law Society, Neath Port Talbot CBC, RTPI, Huw Evans, Lawyers in Local Government, Keith Bush, Natural Resources Wales; Huw Williams (Geldards), Cardiff Council

Responses in agreement (with additional comment)

5.297 *Ceredigion CC, Pembrokeshire CC:* Agreed – keep it simple.

5.298 *Pembrokeshire Coast NPA, National Parks Wales:* Agreed, hopefully this clarity will ensure that National Parks are also included within this terminology – at present there is a tendency for people, including WG and Inspectorate to refer to planning authorities as 'councils'.

5.299 *POSW, Monmouthshire CC***:** Agreed – keep it simple. Also ensure that applications need to be determined by their relevant planning authority rather than allowing applications to apply to their 'preferred' authority.

5.300 *PINS:* This seems an appropriate amendment to existing legislation, and allows for the possibility of joint planning authorities for example, in the future.

5.301 *Newport City Council:* Yes but only if made clear that applicants cannot apply to any planning authority, they must apply for permission to develop in the 'relevant' (local) planning authority. Otherwise we would object

5.302 *Central Association of Agricultural Valuers:* We agree that the use of multiple terms can cause confusion, however it must remain clear who is responsible for determining and enforcing different planning permission for different types of development.

5.303 *Bar Council:* The Bar Council supports this proposal, subject to careful identification of the separate status of the Welsh Ministers.

5.304 *Rhondda Cynon Taf CBC*: There is no objection to the change of term from local planning authority to planning authority and as every local planning authority in Wales is also the minerals planning authority there is no need for that additional term.

Equivocal responses

5.305 *Institution of Civil Engineers Wales:* Yes. WG needs to keep its options open – there could well be a date in the future where to designate a LPA to undertake a new town for example would be necessary.

5.306 *Janet Finch-Saunders AM:* [As] regards development plans, in terms of the definition of a 'local planning authority', I am aware of the possible potential intention of the Welsh Government to move to reorganise local government in the future, and therefore suggest that this is taken into consideration in this regard.

Responses disagreeing

5.307 *Mineral Products Association:* With reference to question 5-13, we have concern over the changes in terminology, in advance of agreement in the review of specific services proposed in Wales. If overview collectives of authorities are to be involved in such matters as minerals, this may have an impact upon some of these terms, depending upon their powers.

5.308 *Carmarthenshire CC:* Stick with reference to Local Planning Authorities – shows they are 'local' bodies, not national etc.

5.309 *Redrow Homes:* Local Planning Authority (LPA) is a recognised and useful term especially in shortened form of using LPA in policies, guidance, reports etc. The introduction of PA is a change for seemingly no real benefit so why change it? It is a UK wide understood term.

5.310 *Bridgend CBC:* No – the term Local Planning Authority (LPA) should be retained in Wales for continuity and to differentiate between the body responsible for the planning function at the local level and any bodies responsible for Strategic planning in the future. LPA should also include "minerals planning authority."

Other comments

5.311 *Llandaff Conservation Area Advisory Group*: Whilst this is not an issue for this review, the Group wishes to make it clear that we are very concerned that budgetary constraints have led to a reduction of 50% in the resources available to Planning Departments in Wales since 2010. with a parallel reduction in specialist conservation advice in Planning Authorities. This has been compounded by reductions in funding for Cadw. We believe that this has already led to heritage matters receiving less consideration than they merit and this could be exacerbated in future unless more resources are made available.

5.312 *RTPI Cymru*: RTPI Cymru believes, given the significance and far reaching/broad subjects covered by the statutory planning function, as demonstrated in this consultation, and the importance of planning in delivering goals in the Welsh Government's Well-being of Future Generations (Wales) Act 2015, each Local Planning Authority (LPA) should have an appropriately qualified (i.e. Chartered) statutory Chief Planning Officer. The role of a Chief Planning Officer for each LPA should be established in legislation to ensure expertise about place and spatial planning at senior management level. This should set out where they would need to be involved in decision-making within and beyond the planning service. It would also establish how and when the Chief Planning Officer would be required to be involved in strategic decision-making. This measure would provide a better planned approach to service delivery and development which will benefit places and people in the longer term.

5.313 *POSW, North Wales Development Managers' Group,* Monmouthshire *County Council*: Each Planning Authority must have a statutory Chief Planning Officer post with an appropriately qualified postholder (similar to the statutory requirement for a Financial Officer under Section 151 of the Local Government Act 1972).

5.314 *Merthyr Tudfil CBC*: Consideration should be given to including the following: Each Planning Authority must have a statutory Chief Planning Officer post with an appropriately qualified post holder (similar to the statutory requirement for a Financial Officer under Section 151 of the Local Government Act 1972).

Chapter 6: Formulation of the development plan

CONSULTATION QUESTION 6-1.

We provisionally consider that Part 6 of the PCPA 2004 (development plans), as amended by the P(W)A 2015, should be restated in the Planning Code, subject to any necessary transitional arrangements relating to the Wales Spatial Plan and to the proposals in the remainder of the Chapter. Do consultees agree?

Number of responses

6.1 Total: 42 (35 in agreement, 1 equivocal responses, and 6 others).

Responses in agreement (without further comment)

6.2 PEBA, POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC, Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC; POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Newport City Council, Torfaen CBC, The Law Society, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, UK Environmental Law Association, National Trust, Natural Resources Wales; Huw Williams (Geldards)

Responses in agreement (with additional comment)

6.3 *Pembrokeshire Coast NPA, National Parks Wales:* Agreed. The National Park Authorities of Wales consider the inclusion of transitional arrangements as being essential and helpful given the current timelines for each of the authorities preparing replacement or revised plans. With regard to paragraph 6.21 of the consultation document and reference to current discussions regarding reforming local government the National Park Authorities of Wales have strong reservations regarding these proposals and will respond to separate consultations when appropriate.

6.4 *Theatres Trust:* The Trust agrees with this proposal in line with our comments in response to Question 5-7. We would recommend that support and protection of culture and the arts should be a priority of the future National Development Framework cited in paragraph 6.14.

6.5 *PINS:* Yes, PINS consider it is important that monitoring continues to be a statutory requirement.

6.6 *Rhondda Cynon Taf CBC*: Yes, it is considered appropriate that the general procedure for preparing a local development plan, that has recently been updated and transferred into the P(W)A, needs to be included in the Bill.

6.7 *Sirius Planning:* We note that there is no change proposed to the procedures for preparing and revising local development plans. However, we would recommend that a requirement is inserted for planning authorities to review their local development

plan every five years, to allow users to fully engage in the plan making process and ensure there is an up to date planning policy framework to guide decisions.

6.8 *Bar Council:* The Bar Council supports this proposal, which reflects the statutory support for the current plan-making arrangements.

6.9 *Newtown and Llanllwchaiarn Town Council:* Yes. Town council is of the view that town and community council place plans should also be incorporated.

6.10 *Friends of the Earth Cymru:* There is duplication between the National Development Framework and Strategic Development Plans (SDPs) and Local Development Plans, and we are of the view that SDPs introduced by Planning (Wales) Act 2015 are unnecessary and should be dropped.

6.11 *Cardiff Council*: Yes subject to deletion of the following clauses

- in order to avoid potential situations where LPA's could find themselves in policy vacuum with no adopted development plan in place and solely reliant on National Planning Guidance to protect environmental, social and economic interests the expiry date for LDP's introduced by part 3, Section 12 of the P(W)A 2015 should be deleted. This is particularly relevant given the new three tier planning system being introduced by Welsh Government which could result in potential delays to LDP production in order to ensure conformity with the higher level SDP and NDF.

- In order to enable LPA's to remain in full control of the LDP preparation process and ensure they reflect local circumstances and evidence the powers given to Welsh Ministers to direct authorities to prepare joint LDP's introduced by part 3, Section 14 of the P(W)A 2015 should be deleted and the previous "voluntary agreement" clause from the PCPA 2004 (Part 2, Section 28) inserted.

Equivocal responses

6.12 *Huw Evans:* Whilst I would agree in principle, there is an issue that development plans are far too long and still duplicate national policy and guidance. When LDPs were introduced they were specifically supposed to be more concise that the UDPs. This simply has not happened in practice with many LDPs running to over 300 pages plus appendices and supplementary guidance. Whilst it may be more appropriate in guidance on the preparation and content of development plans, a requirement that they are no more than 100 pages would help focus policy planner's minds. The problem with plans which are too detailed is that they encourage development managers to become regulatory and make decisions by ticking boxes rather than the using the judgement and skills in which they were trained. Much of the detailed polices can be omitted as they are by and large covered in the TANs.

Other comments: expiry of development plans

6.13 *POSW, North Wales Development Managers' Group, Monmouthshire County Council:* Quoting Planning Policy Wales Edition 9 advises at paragraph 2.1.5: An

LDP ceases to be the development plan on expiry of the plan period, as specified on the plan. An LDP should clearly specify the period to which it is to have effect. Where this is not expressed, the expiry period is to be treated as the 31 December of the calendar year specified on the plan. When adopted, there should be at least 10 years of the plan period remaining. (Section 12 of the 2015 Act). Clarification is sought: Taking Swansea as an example - at EIP at the moment and its LDP runs from 2010 to 2025. They are unlikely to adopt until the autumn of 2018 leaving only 7 years until the expiry date. A review of this element of the 2015 Act and supporting guidance would provide greater flexibility for Authorities who wish to transition to new ways of working regionally. This would provide LPAs with increased capacity to develop SDPs without having to also concentrate on reviewing their LDP within the four years following adoption or replace them due to a looming drop dead date. Such flexibility may even be a restricted window of opportunity until SDPs are well progressed or adopted after which LPAs can then progress to prepare either joint LDPs or a light touch LDP.

6.14 *Ceredigion County Council:* Removal of LDP expiry dates and 4 year requirement to review;

6.15 *Neath Port Talbot CBC:* With the increasing focus on regional working and the need for Strategic Development Plans, there are real concerns about capacity within the service. 'Planning Policy Wales Edition 9 advises at paragraph 2.1.5: An LDP ceases to be the development plan on expiry of the plan period, as specified on the plan. An LDP should clearly specify the period to which it is to have effect. Where this is not expressed, the expiry period is to be treated as the 31 December of the calendar year specified on the plan. When adopted, there should be at least 10 years of the plan period remaining. (Section 12 of the 2015 Act). (Although it is evident that WG are ignoring this requirement in relation to a LDP which is currently going through Examination in Public which following adoption will only have 7 years until the drop dead date)

A review of this element of the 2015 Act and supporting guidance would provide greater flexibility for all Authorities who wish to transition to new ways of working regionally. This would provide LPAs with increased capacity to develop SDPs without having to also concentrate on reviewing their LDP within the four years following adoption or replace them due to a looming drop dead date. Such flexibility may even be restricted to a window of opportunity until SDPs are well progressed or adopted after which LPAs can then progress to prepare either joint LDPs or a tight touch LDP. This element of the legislation therefore needs consideration.

Other comments: neighbourhood plans

6.16 *Llanfair Dyffryn Clwyd Community Council:* The evidence in England [https://www.ourneighbourhoodplanning.org.uk/about/npa area list] would strongly suggest that a Neighbourhood Planning process, leading to Neighbourhood Development Orders has achieved a substantial uptake and offers an effective approach to promote sensitive, locally-driven forward planning mechanisms for development and community enhancement. There is no argument presented in the consultation paper to suggest why it is inappropriate for Wales to implement these provisions from the Localism Act 2011 to enable communities to benefit from a more

grass roots approach to development that can support a better informed and more effect Local Planning process, drawing on well researched strategic and local evidence.

CONSULTATION QUESTION 6-2.

We provisionally propose that:

(1) **the provisions currently in the Planning and Energy Act 2008 are not restated in the Bill;**

(2) **consideration is given in due course to:**

- **including equivalent provisions in guidance; and**
- **making appropriate amendments to the Building Regulations.**

Do consultees agree?

Number of responses

Total: 33 (31 in agreement, 1 equivocal response and 1 in disagreement).

Responses in agreement (without further comment)

6.17 PEBA, Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, National Trust, Neath Port Talbot CBC, RTPI, Lawyers in Local Government, Keith Bush

Responses in agreement (with additional comment)

6.18 *Pembrokeshire Coast NPA, National Parks Wales:* These provisions are based on the requirements needing to be 'reasonable' in nature. For a development to use local renewable energy and low carbon sources or for a development to comply with an energy efficiency standard higher than building regulations are matters that a planning authority will struggle with if expectations are not enshrined/ made a specific requirement in either national policy or building regulations or both following a thorough examination as to what is reasonable. Experience has shown that the evidence required for the introduction of sprinklers was hotly debated and challenged repeatedly. These potential requirements need a national platform debate and evidence base to progress them. A linked example is going beyond building regulation requirements for life time homes where again the assessment of viability is beyond the expertise of local planning authorities.

6.19 *POSW, Monmouthshire CC, Ceredigion CC, Torfaen CBC:* Yes. These provisions are based on the requirements needing to be 'reasonable' in nature. For a development to use local renewable energy and low carbon sources or for a development to comply with an energy efficiency standard higher than building regulations are matters that a planning authority will struggle with if expectations are

not enshrined/ made a specific requirement in either national policy or building regulations or both following a thorough examination as to what is reasonable.

6.20 *Carmarthenshire CC:* Agree. The purpose of the Act was to encourage the inclusion of energy policy requirements in local development plans which included the scope for local authorities to provide local targets in their local development plans for onsite energy generation from renewable or low carbon sources, and for energy efficiency standards. This would allow local authorities to include requirements within their LDPs in addition to national requirements and that exceeded the energy requirements of building regulations.

In view of the evolution of the national planning policy context and building regulations in Wales in relation to renewable and low carbon energy, these provisions no longer appear to be needed. It is also understood that the Welsh Government's LDP Manual is being reviewed with the view of providing further guidance on the content of LDPs, and therefore it is agreed that it would be more appropriate for the Manual to address this matter.

6.21 *Pembrokeshire CC:* Agreed, consideration should be given to equivalent provisions in guidance and appropriate amendments to Building Regulations

6.22 *Newport City Council:* Yes, these are suggestions rather than requirements and should be placed within guidance documents.

6.23 *Central Association of Agricultural Valuers:* We agree that requirements relating to the use of energy from local renewable and low carbon Sources can be more appropriately provided for in guidance than legislation.

6.24 *Sirius Planning:* We support the proposal to move the renewable and energy efficiency policy provisions from statute to plan to make guidance and Building Regulations, where they will likely have more scope to increase the generation of renewable energy and drive down energy consumption.

6.25 *The Law Society; Huw Williams (Geldards):* We agree. Such considerations now fall to be considered in any event in discharge of the duties under the Well-being Act 2015.

6.26 *Bar Council:* The Bar Council supports the aim of simplification within this proposal, but has no specialist position on the merits of the proposed drafting or how prominence can be given to these statutory aims.

6.27 *Natural Resources Wales:* As explained in paragraph 6.31 of the consultation document, the requirement to undertake a Sustainability Appraisal, and a SEA emanate from different items of legislation which also set out, to varying degree, the nature of, and the procedures to follow, in undertaking the respective assessments/ appraisals. For this reason, and for the reasons set out in paragraph 6.34 (1) and (2) of the consultation document, it seems appropriate to retain the current existing provisions. As part of a wider Planning Code, national planning policy and guidance can clarify how those assessments/ appraisals may be undertaken e.g. separately, or in association. Where the opportunity arises, the regulations and guidance could be aligned more closely with Sustainable Management of Natural Resources (SMNR)

and Sustainable Development principles. SEA/SA is a tool that integrates such considerations into plan making and when done properly leads to better plans delivering multiple benefits for economic, social, environmental and cultural wellbeing. SEA/SA can be used to promote integration of SMNR and sustainable development and to test a plan's performance against these principles.

6.28 *Rhondda Cynon Taf CBC*: The proposed amendments in question 6-2 are supported for the reasons set out in the text in sections 6.28 – 6.30.

6.29 *Cardiff Council:* Yes, but note these provisions may need updating to reflect proposals relating to renewable energy targets set out in the current consultation on draft PPW (Edition 10).

Equivocal responses

6.30 *PINS:* Since the overall aim is to simplify and consolidate planning law it might be appropriate to restate the provisions of Energy Act in the Bill so that everything is in one place. On the other hand, as those provisions encourage and allow, rather than being strict requirements, PINS agrees that the purposes of the Energy Act would be met through inclusion in guidance and Regulations. The decision depends on whether it is important to maintain the special emphasis on renewable energy conferred by the Energy Act.

Responses disagreeing

6.31 *Bridgend County Borough Council:* No – No – No

CONSULTATION QUESTION 6-3.

In light of the existence of duties to carry out sustainability appraisals of the NDF and strategic and local development plans, currently under Part 6 of the PCPA 2004:

(1) **is there a continuing requirement for a separate appraisal to be carried out of their environmental impact, as currently required by the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004?**

(2) **are the 2004 Regulations still required in relation to plans and programmes other than the NDF and development plans? or**

(3) **do the 2004 Regulations need amendment or simplification in any way?**

Number of responses

6.32 Total: 36 (9 responses in favour of continuing the SEA requirement, 20 equivocal responses, 7 responses in favour of removal).

Responses strongly in support of continuing SEA requirement

6.33 *Royal Society for the Protection of Birds:* (1) Yes - we strongly support the continued requirement for SA and SEA of NDF and strategic and local development plans. SEA

is a specific tool to ensure the environmental effects of the Plan are given due regard. Furthermore, SEA incorporates a methodology which supports an ecosystems approach towards decision making. We therefore consider that SEA is not only compatible with both the Well-being of Future Generations Act's goals and sustainable development principle and the Environment Act's principles for the Sustainable Management of Natural Resources, but that is an essential element of the toolkit to ensure these Acts' requirements are effectively delivered.

A sound SEA process enables strategic consideration of possible future projects and identifies how potential impacts of future developments could be reduced as well as any positive outcomes enhanced. SEA provides strategic consideration of development locations aiming to select the least environmentally damaging alternative.

6.34 Therefore continuation of SEA of NDF and strategic and local development plans will:

- Ensure that a framework for environmentally sustainable development is established;
- Allow the consideration of alternative policy options at the national and local levels, thereby permitting greater flexibility in planning the types and locations of developments;
- Help to avoid unnecessary environmental, social and economic costs (e.g. unnecessary/ineffective mitigation or compensation costs);
- Bring to light potential conflicts between the Government's stated environmental commitments and nationally significant development projects, thereby supporting joined-up government and an efficient and timely planning system;
- Ensure effective consideration of transboundary environmental issues.
- Enhance public participation and consultation on strategic issues, and contribute to a publicly accountable decision-making framework; and
- Reduce the need to reassess issues and effects, particularly cumulative effects, at the project level where such issues are more effectively addressed at a strategic level.

Whilst our preference is retain the two distinct assessments we recognise there is potential for better integration between SA and SEA of the NDF and the strategic and local plans, similar to what currently happens in England and Northern Ireland. However, it essential that the requirements of the SEA regulations continue to be met in full as part of any integrated approach. The RTPI has recently published practical advice on improving the effectiveness and efficiency of SEA/SA for land use plans which could provide helpful guidance in this regard. See here: http://rtpi.org.uk/knowledge/practice/sea/

6.35 (2) Yes, the 2004 Regulations must still be required in relation to plans and programmes other than the NDF and development plans. The SEA Directive has a

broad scope and applies to a wide range of public plans and programmes (e.g. on land use, transport, energy, waste, agriculture, etc). Plans and programmes in the sense of the SEA Directive must be prepared or adopted by an authority (at national, regional or local level) and be required by legislative, regulatory or administrative provisions.

An SEA is mandatory for plans/programmes which:

- are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste/ water management, telecommunications, tourism, town & country planning or land use and which set the framework for future development consent of projects listed in the EIA Directive; or

- have been determined to require an assessment under the Habitats Directive.

Therefore, the application of SEA goes much wider than development plans. It is essential that this broader application is retained so the environmental effects of different types of plans (including key Government plans) are fully considered. Importantly SEA of plans and programmes ensures:

- A high level of protection of the environment through, for example, consideration of alternatives aiming to select the least environmentally damaging option

- Integration of environmental considerations into the preparation of plans and programmes.

- Provides for public participation in decision-making and provides a framework for identifying alternatives, cumulative and transboundary impacts as well as options for mitigation or compensation at a strategic level.

There is potential, which we support, for SEA to apply even more broadly, similar to the approach in Scotland which applies SEA to Government strategies, for example, the Scottish Government Energy Policy Strategy.

In terms of whether the SEA Regulations can be simplified or amended, we believe the immediate focus should be ensuring that all European legislation protecting the environment (including SEA) is fully converted into domestic law (including preambles, principles and jurisprudence) and is properly implemented and enforced post-Brexit.

Although most environmental matters are devolved, to date EU legislation in this area has helped to provide a common framework across the UK's four nations – crucial given that many environmental issues do not respect borders. As such, we believe it is vital that the UK and devolved governments reach agreement on how to effectively retain such common frameworks in domestic law post-Brexit, whilst retaining the ability for individual countries to develop more ambitious approaches (as is currently the case under EU law and as Wales has done through its Well-being of Future Generations and Environment (Wales) Acts). The loss of these common frameworks

would risk significant regulatory divergence and a less co-ordinated approach to addressing shared environmental challenges. This could undermine our ability to deliver sustainable development across the UK and, in a worst-case scenario, lead to a destabilising process of competitive deregulation across the different jurisdictions.

Without adequate governance arrangements there is a real risk that laws will be enforced inadequately or inconsistently bringing uncertainty to planning and development. For such common frameworks to be fully effective, therefore, all four governments will also need to work together to address the post-Brexit environmental governance gap i.e. designing new domestic governance arrangements to replace the functions currently carried out by EU institutions in ultimately overseeing and enforcing compliance with environmental standards across the four nations. Our early thinking is that a new high level body, or set of bodies, should be jointly designed, co-created and co-owned by the four governments to address this gap across the four UK nations, with responsibility for roles such as compliance checking, monitoring, supervision and information provision, and with the power to initiate action through the courts.

Maintaining relatively close cooperation and alignment with the EU on these matters in future would also deliver a range of potential benefits that urgently needs to be explored in more detail. In this context, it is worth noting that the European Commission has recently highlighted alignment with EU rules on environmental assessment as an area that will be key to ensuring a level playing field between the UK and the EU in any post-Brexit trade deal.

Notwithstanding these points, there are aspects of current environmental assessment processes which could be improved, in particular through better implementation. For example, SEA is often undertaken too late in the plan preparation process to have a meaningful influence on projects downstream and the outputs can often be overly technical and difficult for the public to engage with.

Responses in support of continuing SEA requirement (without further comment)

6.36 Institution of Civil Engineers Wales, Bridgend CBC

Responses in support of continuing SEA requirement (with additional comment)

6.37 *Planning and Environment Bar Association (PEBA):*

- There is no requirement for a separate appraisal, provided that the required sustainability appraisal procedure fulfils the requirements of EU Directive 2001/42/EC. Moreover, those requirements should continue to be an integral component of sustainability appraisal following Brexit, in order to secure and maintain strategic environmental assessment of development plans.

- There are likely to be other plans and programmes that fall with the scope of EU Directive 2001/42/EC and in respect of which transposition of that Directive into Welsh law continues to be necessary in the form of the 2004 Regulations.

- We suggest that this issue should be addressed in the light of the legislative changes that are in progress to give effect to Brexit.

6.38 *Sirius Planning:* We consider that SEAs will continue to have a role over and above SAs. The SEA places a requirement to consider a wider number of plans and programmes from different sections which could have competing agendas, but all are affected by development and planning. Maintaining SEA will ensure that development policies appropriately provide for these.

6.39 *RTPI:* We do not believe that now is the time to consider abolishing or significantly amending the regulations associated with the Strategic Environmental Assessment (SEA) Directive. With the SEA requirement applying with justification to a wide range of plans and programmes, it would not be appropriate for the requirement in relation to development plans to be disassociated from the requirement that applies to other plans and programmes.

6.40 The RTPI is currently commissioning research to consider the most appropriate process(es) that could be introduced to work alongside the planning systems of the UK after departure of the EU, which would still allow compliance with international requirements and not lower standards.

6.41 *Huw Williams (Geldards)*: Agree. Such considerations now fall to be considered in any event in discharge of the duties under the Well-being Act 2015.

6.42 *Rhondda Cynon Taf CBC*: SA and SEA of recent Local Development Plans were essentially undertaken under a combined process, and this in such a comprehensive way that they covered more than the requirements of both. Furthermore, the SA's of plans are so thorough in themselves, that they would cover all necessary elements of the SEA regulations. Accordingly, there may no longer be the requirement for such a separate appraisal.

6.43 *Cardiff Council*: As stated above, it is proposed to incorporate Part 6 of the PCPA 2004 into the code, and so any duplication of duties that may arise from the said Regulations should be removed, and any remaining additional requirements in relation to plans and programmes other that the NDF and development plans should be incorporated into the same part of the code as the said Act.

Equivocal responses

6.44 *UK Environmental Law Association:* According to the Well-being of Future Generations (Wales) Act 2015 sustainable development should be achieved with reference to seven statutory goals which account for environmental impacts. It might be assumed that sustainability appraisal would reflect this approach and Planning Policy Wales is currently being amended in this respect. Nevertheless, it is arguably important to be more specific about the requirements for the assessment of environmental effects as is achieved currently by the SEA regulations. Therefore, SEA now forms part of the sustainability appraisal, following which further judgement can be made about the way in which those effects should be balanced against other societal goals. SEA is also clearly linked to the process of EIA and so any process of reform would also need to include reference to that process. Environmentalists are concerned that Brexit may be viewed as an opportunity to 'water down' some of these

processes currently under EU law that have proved very significant in environmental protection. Thus, although the Law Commission's suggested approach may appear to be logical, any reform in this area should be approached with caution.

6.45 *Pembrokeshire CC, Torfaen CBC, Ceredigion CC, POSW, Monmouthshire CC, Pembrokeshire Coast NPA, National Parks Wales:* (1) The guidance provided by Welsh Government on the process is helpful.

(3) What is proving more difficult to consider is the Welsh Language in the appraisal process when set against national planning policy and the Welsh Language Standards. The standards appear to have greater expectations regarding what can be achieved. Similarly the appraisal of the Plan against the Wellbeing goals is difficult as a balance has to be struck when all goals cannot be achieved in a positive manner. The integration of Equalities Impact Assessment into the process should also be considered.

6.46 *Association of Local Government Ecologists (Wales):* With regard to SEA and SAs, we would also ask whether the use and integration of Health impact assessments could be considered. Welsh Government has identified a healthier Wales as one of the WFG goals. Planning has a long tradition of public health concerns (air quality, noise, sanitation, overcrowding, housing quality and availability, fire etc), this could be added to with the recognition of environmental / lifestyle contributions to addressing obesity and mental health issues etc.

6.47 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* At present this is a requirement under the regulations, and therefore needs to form part of the process. It is however agreed that there is significant duplication, which in turn leads to significant expense. Therefore, there may be an opportunity in the future to consider unifying the processes. However, at present it is agreed that due to legislative constraints that this is not an option at present.

6.48 *Ceredigion CC:*

- Yes a continuing need, but can be integrated with SA – subject to signposting of respective requirements;
- If retained needs to be greater clarity as to its application to what other Plans and Programmes.
- Much to be gained from simplification of the 2004 regulations.

6.49 *Carmarthenshire CC:* The integration of the two approaches Sustainability Appraisal/Strategic Environmental Appraisal into one appraisal document works best. The guidance provided by Welsh Government on the process is helpful.

There is an argument that the Sustainability Appraisal process should be integrated within an Integrated Assessment which would also include the Well-being of Future Generations Assessment.

6.50 *Pembrokeshire Coast NPA & National Parks Wales:* Each NPA in Wales has prepared at least one Sustainability Appraisal/Strategic Environmental Appraisal. Our experience has shown that integration of the two approaches in the one appraisal document works best. The guidance provided by Welsh Government on the process is helpful. As long as any revised process ensures the same rigour is applied to the examination of options and proposals then the National Park Authorities would not have an issue with the integration of regulation and guidance.

In response to (1) the following observations are made:

- By incorporating the SEA (and also the HRA) into the Sustainability Appraisal, it could be perceived as weakening of the protection/primacy or importance that these assessments currently have.
    - There is an argument that the Sustainability Appraisal process should be integrated within an Integrated Assessment which would also include the Well-being of Future Generations Assessment.
    - The SA/SEA/HRA assessment processes could in principle be carried out within the Integrated Assessment providing that the detail of their respective legislations are carried over into, and fully included within, the requirements of the Integrated Assessment.
    - This would result in sustainable development being in the correct position as the overarching requirement under which everything else fits.
    - The SA and SEA process should be kept separate in the interim as a temporary requirement until the SEA could be subsumed within the Integrated Assessment.
    - With either the SEA or HRA remaining outside or separate to the Integrated Assessment, this would send a confusing message to administrations.
    - Requirements such as the HRA could be treated in the same way as the other assessments ie if the Integrated Assessment reveals some concerns about habitats or equality, for example, it would trigger a fuller exploration of those impacts using the HRA and Equalities assessment.
    - By integrating the SEA and HRA into the Integrated Assessment this would ensure that after Brexit the requirements of both would be kept at the heart of any assessment processes in Wales.

6.51 *Allan Archer:* I agree with the Commission's conclusion that now is not the right time to consider abolishing or significantly amending the regulations associated with the Strategic Environmental Assessment (SEA) Directive. With the SEA requirement applying with justification to a wide range of plans and programmes, it would not be appropriate for the requirement in relation to development plans to be disassociated from the requirement that applies to other plans and programmes.

From experience at the Pembrokeshire Coast NPA & National Parks Wales, I think that integration of the two approaches in the one appraisal document has worked well and the guidance provided by Welsh Government on the process is helpful. I think that, providing the requirements can continue to be satisfied in one document, that the Regulations should remain and that its wider application to plans and programmes should also remain.

6.52 *Newport City Council:* Agree with the points, however the SEA and SA for a development plan are incredibly onerous and there is a need to significantly confine the duties. A major overhaul of the processes would be supported.

6.53 *The Law Society:* We consider that the position should be standardised on the sustainability appraisal duty and following detailed consideration of the Directive any necessary adjustments made to ensure conformity with EU Law or preserved EU law, whichever applies at the time.

If the NDF fulfils the aspirations of the IAG then most major plans and programmes will have been strategically assessed as part of the NDF process. However, there may be exceptions where programmes are brought forward outside the NDF. However, rather than create a parallel system against such an eventuality it should be possible on detailed consideration to apply by reference the sustainability appraisal process in the Code.

Simplification of the 2004 regulations, bearing in mind the method of transposition must, in our view await the conclusion of the negotiations on the UK's withdrawal from the EU and the scope that will then be afforded by virtue of the Withdrawal Treaty and the terms of the declaration of the Joint Ministerial Committee of the 16th October 2017.

6.54 *Bar Council:* The Bar Council confines its response to (1). This is an area where there has been considerable litigation in England, and there is merit in streamlining the statutory provisions to ensure that the requirement for SEA is clear on the face of the main primary legislation.

The Bar Council is aware of the controversy over development plan documents (DPDs) and supplementary planning documents (SPDs) and the continuing controversy in respect of the correct approach to "reasonable alternatives" and related provisions within the SEA Regulations. However those are matters best addressed by specialist consultees.

6.55 *Merthyr Tudfil CBC, Neath Port Talbot CBC:* Agreed.[1]

Responses in support of removing SEA requirement (without further comment)

6.56 *Keith Bush:* Agree that there is no need for a separate appraisal.

[1] It is unfortunately not clear what is being agreed with.

Responses in support of removing SEA requirement

6.57 *PINS:*

- Removing the requirement would be a welcome simplification.
- The Regulations cover any plan or programme which sets the framework for future development consent of certain projects and is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism as well as town and country planning and land use. (Section 5). The Local Development Plan Manual states that the integrated SA process can also encompass other types of plan appraisal for example equality, disability and Welsh language implications should be considered as part of the social impacts of the plan [LDP] (para3.2.3). Many of the plans/programmes/projects for which SEA is required will not part of an LDP and subject to SA. It is likely, therefore, that the 2004 Regulations are still required.
- The 2004 Regulations need amending to remove requirement for SEA from projects, allocations, strategies etc set out in LDPs.

6.58 *Accessible Retail:* [The SEA Regulations] achieve the same benefit and the requirement to carry out the same assessments twice leads to unnecessary expense and delay.

6.59 *National Grid:* The proposal to align the operation of the SEA and SA processes is a good suggestion. There is an opportunity to achieve increased efficiency without reducing the careful consideration of important issues.

6.60 *Caerphilly CBC and POSW South East Wales:* As stated above, it is proposed to incorporate Part 6 of the PCPA 2004 into the code, and so any duplication of duties that may arise from the said Regulations should be removed, and any remaining additional requirements should be incorporated into the same part of the code as the said Act.

Responses strongly in support of removing SEA requirement

6.61 *Blaenau Gwent CBC:* The removal of duplication is welcomed.

CONSULTATION QUESTION 6-4.

We provisionally propose that section 114 of the PCPA 2004 (responsibility for procedure at local plan inquiries) should not be restated in the Planning Bill. Do consultees agree?

Number of responses

6.62 Total: 24 (24 in agreement).

Responses in agreement (without further comment)

6.63 PEBA, Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Theatres Trust, Pembrokeshire CC, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush; Huw Williams (Geldards); Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with additional comment)

6.64 *National Trust:* Agree that that section 114 of the PCPA 2004 (responsibility for procedure at local plan inquiries) should not be restated in the Planning Bill.

6.65 *Newport City Council:* Yes, it would be useful to have the Inquiry procedures and everything relating to development plans in one place.

6.66 *Bar Council:* As set already above, the Bar Council is in general support of the omission of redundant statutory provisions.

CONSULTATION QUESTION 6-5.

We consider that Chapter 2 of Part 6 of the TCPA 1990 (blight notices) and Schedule 13 to the Act should be restated in the Planning Bill in broadly their present form. Do consultees agree?

Number of responses

6.67 Total: 25 (24 in agreement, and 1 other).

Responses in agreement (without further comment)

6.68 PEBA, Allan Archer, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire CC, PINS, National Trust, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush; Huw Williams (Geldards); Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with additional comment)

6.69 *Country Land and Business Association:* Yes. Blight Notices are governed by rigid criteria which unnecessarily restricts their application

- Blight notices do not relate to the freehold interest of tenanted properties. There are circumstances where the landowner is left with a number of vacant and some occupied offices in a development that is impacted by a statutory scheme. Often it would make sense for the authority to acquire all of these in advance, however under a blight notice this is not possible

which often leaves the landowner looking after a site in a form of managed decline.

- The £36,000 rateable value upper limit on the service of a Blight Notice, is outdated and arbitrary. Ideally the upper limit should be removed, or at least increased in line with the increase in rateable values.

Other comments

6.70 *Central Association of Agricultural Valuers:* We agree that it is extremely important to protect the rights of individuals affected by planning blight and so do not wish to see any changes that weaken the effect of present law.

CHAPTER 6: GENERAL COMMENTS

6.71 *Chartered Institute of Building:* The CIOB would like to see the reintroduction of the TAN22 (technical advice note) requirement for sustainable and low carbon solutions which would also position Wales at the forefront of the industry, as it was a decade ago before this requirement was discontinued.

6.72 With the upcoming city deals and metro mayors, we feel it would be advisable that a TAN needs to be looked at to give provision for simple alterations to the local development plan to be in place to assist with town planning around new nodes/hubs that may well have been earmarked for other uses prior to a projects development, such as housing zones moved to commercial.

6.73 *Mineral Products Association:* With reference to paragraph 6.7, should this list not include PPW? Further the absence of comments in response to the scoping, may reflect the limited range of consultees on the scoping document itself.

**** Allied to the concept of an application which establishes the principle of development (whether it is an outline planning application or an alternative approach) there is an opportunity to reform legislation and place greater weight on existing mechanisms within the planning system.

For example, allocated sites within the development plan should be given greater weight in terms of their effect on establishing the principle of development. It is a common principle of valuation practice that the value of a site is only really reliably crystalized upon grant of an implementable planning permission and that outline consent therefore serves a very important role in the sale of land for development. To enable value to be able to be reliably assigned to a site, in theory it should be very straightforward for developers to submit an outline planning application (or such an alternative) for the development of an allocated site with inherent flexibility to reserve all matters on the basis that the principle of developing the site will have been implicitly assessed during the development plan's preparation and established on its adoption. The reality is that developers are still being asked to present overly detailed submissions at outline planning application stage, even for allocated sites.

In addition to making clear the weight that should be given to allocated sites in the determination process, there should be greater weight applied to pre-application advice provided by local planning authorities. Such advice should be a binding decision on the principle of developing a site in the same context as allocated sites within the development plan.

Such weight would provide developers with the necessary comfort with which to invest in progressing more detailed proposals and investigations to pursue full planning permission and help generate quicker site development. Furthermore, with respect to smaller infill development and windfall sites, SME developers will be able to rely on such a mechanism to justify initial upfront investment (where they would otherwise not be able to in justifying the risk) thereby having a positive impact on market activity within the SME sector. This is especially pertinent in Wales where the arrangement of settlements outside the major urban conurbations relies on SME developers to deliver development on smaller infill sites.

6.74 *Friends of the Earth Cymru:* We agree with the Law Commission's proposal to remain with PCPA 2004 on plan-making (Part 6). However 62(5) could do with referencing the well-being goals (WFG Act 2015) and other relevant legislation such as the targets in the Environment Act; and 62(6) would be improved by referring to SEA rather than sustainability appraisal. SEA is a much more robust and meaningful process and without the EU-parent directive, recital and preambles, this needs putting into the Welsh planning code properly. 64(6) is a cornerstone of democratic public participation (the right to be heard in person) and is an essential provision following the Aarhus Convention.

The most important element of public participation in planning decision-making is the right to be heard in person at local plan inquiries. This has not been afforded to persons affected by the NDF. We also note here Article 7 of the Aarhus Convention which states: Each party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. It also refers parties to the need for (Art 6(3)) "The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public" and "for the public to prepare and participate effectively during the environmental decision-making". In addition Art 6(4) is extremely important "Each party shall provide for early public participation, when all options are open and effective public participation can take place".

The Law Commission should consider how the local plan-led system in Wales is undermined because of the need to align three tiers of statutory plans. Transition, timings and coordination could mean that Wales simply has no effective development plan system for a number of years. In our view the local plan should remain the pre-eminent plan, and the Welsh Government should aim to maintain stability in the plan-making system. While developers may welcome a development control system, there are well documented public costs from speculative and short term decisions that are not based on a plan-led approach. The other consideration of the several tiers of plan-making is the impact on public participation and democratic accountability. With regard to public participation, this happens in two ways

- By undermining the local plan, the right to be heard and contribute through local plan inquiries becomes devalued as the plan's value and influence on development decisions falls or disappears.

- Centralised decisions that bypass local government mean that opportunities such as speaking rights at planning committee, and the opportunity to speak to ward councillors or local planning committee councillors in people's local area are no longer relevant.

The Law Commission should consider the importance of public speaking rights at planning committees being codified in order to enhance public participation and strengthen democratic accountability.

Chapter 7: The need for a planning application

CONSULTATION QUESTION 7-1.

We provisionally propose that the power of the Welsh Ministers to remove certain categories of demolition from the scope of development, currently in TCPA 1990, s 55(4)(g), should not be restated in the new Bill, but that the same result should be achieved by the use of the GPDO. Do consultees agree?

Number of responses

7.1 Total: 40 (34 in agreement, 3 equivocal responses, and 3 other responses relating to permitted development generally).

Responses in agreement (without further comment)

7.2 Institution of Civil Engineers Wales, Penstrowed Community Council, CLA, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, PINS, Bridgend CBC, Lawyers in Local Government, Keith Bush; PEBA;

Responses in agreement (with additional comment)

7.3 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Pembrokeshire CC, Carmarthenshire CC, Ceredigion CC, Neath Port Talbot CBC; Cardiff Council:* Agreed. Certain categories of demolition should be achieved through the use of the GPDO. However the prior notification requirement should be retained to control the method of demolition for ecological, highway safety etc. reasons.

7.4 *Merthyr Tudfil CBC:* Agreed. It will be important the GDPO is updated accordingly.

7.5 *Blaenau Gwent CBC:* This makes sense. The law concerning demolition is complex and confusing. Provided that demolition is clearly stated as “development” then including PD tolerances in the GPDO is a reasonable suggestion.

7.6 *Caerphilly CBC and POSW South East Wales:* Yes, the existing provisions are complicated. Much better to state that demolition is development, and then designate some demolition as permitted development.

7.7 *Allan Archer:* I agree that using the GPDO as the means of determining when demolition should be the subject of a planning application is a logical approach to simplifying the procedure with the added security that if a situation warrants it locally an Article 4 Direction can be used to withdraw the permitted development rights to bring specific types of demolition back under control.

7.8 *National Trust:* Using the GPDO as the means of determining when demolition should be the subject of a planning application is a logical approach to simplifying the procedure with the added security that if a situation warrants it locally an Article 4 Direction can be used to withdraw the permitted development rights to bring specific types of demolition back under control.

7.9 *Newport City Council:* Yes, all demolition should be development and any exemptions dealt with via permitted development regulations.

7.10 *Chartered Institute of Architectural Technologists:* We agree that demolition applications could be complex, which has led to many developers leaving elements of buildings, walls and monuments to decay over years and thus becoming an eyesore and potential hazard. Being able to simplify the process by omitting certain categories could help cut out the bureaucracy and confusion.

7.11 *Friends of the Earth Cymru:* Demolition should be part of 'development' definition, and the GPDO parts on demolition must be consulted on to arrive at a better position on demolition.

7.12 *Torfaen CBC:* Yes, the existing provisions are complicated. Including demolition within the definition of development, and allowing certain types of demolition as 'permitted development' would simplify matters.

7.13 *RTPI:* We suspect that there may be a typing error in this question in that it proposes that s55(4)(g) in TCPA 1990 should not be restated in the new bill whereas it should refer to s55(2)(g)? Apart from this detail, using the General Permitted Development Order (GPDO) as the means of determining when demolition should be the subject of a planning application is a logical approach to simplifying the procedure with the added security that if a situation warrants it locally an Article 4 Direction can be used to withdraw the permitted development rights to bring specific types of demolition back under control.

7.14 *Canal & River Trust:* We agree, subject to the 'two remaining categories' of demolition identified in paragraph 7.16 being 'permitted development' under the GPDO as proposed in that paragraph.

7.15 *Andrew Ferguson:* Agree that 'demolition' should be included within definition and no exemptions within the Code to simplify the law in this regard.

7.16 *Huw Williams (Geldards):* Agree. The proposed simplification would be most welcome.

7.17 *Rhondda Cynon Taf CBC:* Agree - this proposal would lead to a simplification of the law.

Equivocal responses

7.18 *Douglas Hughes Architects Ltd.:* While we consider the spirit of what is suggested here in relation to demolition to be positive, we are not clear as to whether you are suggesting that all forms of demolition would be regarded as development and would request clarification of this point.

7.19 *The Law Society:* We agree. It would create greater certainty if all demolition required planning permission, subject to clearly defined permitted development rights in certain circumstances. Much of that benefit would be lost, however, were the permitted development rights themselves not clearly defined. This should include

making it clear whether the rights only apply to total demolition, or partial demolition (which could otherwise be considered as an alteration).

7.20 *Theatres Trust:* The Trust agrees, as this proposal would appear to remove the potential for duplication. However, we would strongly object to any removal or weakening of regulation in relation to the demolition of listed buildings and buildings within conservation areas. We would in fact suggest that any building in use as a community or cultural facilities is also included within the definition of development for the purposes of demolition

Other comments: definition of development generally

7.21 *Friends of the Earth Cymru:* Section 55 of the TCPA 1990 is essential and must be retained.

7.22 *National Grid:* The intended simplification of the definition of development has the potential to be useful. However, there are circumstances where the definition is important to the continued operation of some controls which are beyond the immediate control of the Welsh Government. This is noted in Chapter 18 of the consultation`n. Our comments on Chapter 7 and Chapter 18 below explain why it will be important to ensure that any changes arising from this chapter are carefully aligned with those other revisions.

7.23 *RTPI Cymru:* In relation to the reference at 1.6(1) "which categories of development require specific authorisation of some kind, which should in general be permitted automatically, and which require authorisation only in particular cases;" we raise concerns that these boundaries or thresholds (e.g. permitted development) have in England been increasingly subject to politically-driven change and have therefore lacked stability over time.

CONSULTATION QUESTION 7-2.

We provisionally propose 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 floorspace of a building, whether underground or otherwise, is development. Do consultees agree?

Number of responses

7.24 Total: 32 (28 in agreement, 1 equivocal response, 2 in disagreement, and 1 other).

Responses in agreement (without further comment)

7.25 Institution of Civil Engineers Wales, Penstrowed Community Council, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Theatres Trust, Keith Bush; PEBA; Huw Williams (Geldards), Cardiff Council

Responses in agreement (with additional comment)

7.26 *Pembrokeshire Coast NPA & National Parks Wales:* Agreed, this will enable the impact of all increases in floorspace to be considered. In the past there has been the assumption that it is all a question of 'visual impact' which clearly isn't the case.

7.27 *Allan Archer:* On the basis of the reasoning set out in the report, I support the proposed clarification of the wording of TCPA 1990 s55(2)(a) as a logical approach to simplifying the matter of when internal alterations to a building constitute development, with the relaxation of when a planning application is required for these works being controlled, if thought necessary, through the GPDO.

7.28 *CLA:* Yes provided the GDPO is updated.

7.29 *POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC:* Agreed - This will enable the impact of all increases in floor space to be considered.

7.30 *Carmarthenshire CC:* Agreed. This will enable the impact of all increases in floorspace to be considered. The GPDO is the correct place to set out any exemptions.

7.31 *National Trust:* National Trust support the approach to simplifying the matter of when internal alterations to a building constitute development, with the relaxation of when a planning application is required for these works being controlled through the GPDO.

7.32 *Newport City Council:* Completely agree, closes down existing loopholes.

7.33 *The Law Society:* It would aid certainty for there to be a single exclusion, subject to appropriate permitted development rights. It should be noted, though, that the approach proposed would in the first instance result in all internal works requiring planning permission. It is not clear whether the proposals would replicate the two limited circumstances in which planning permission is required for these internal works, or whether the opportunity would be taken to expand the need for planning permission beyond where those internal works relate to providing additional underground floorspace or increasing floorspace by more than 200 square metres where the building is used for the retail sale of goods.

7.34 *RTPI:* We support this amendment to the wording of TCPA 1990 s55(2)(a) as a logical approach to simplifying the matter of when internal alterations to a building constitute development, with the relaxation of when a planning application is required for these works being controlled through the GPDO.

7.35 *Andrew Ferguson:* Agree that all "internal" works that increase floorspace to be considered as development and GPDO used thereafter to provide exemptions.

7.36 *Pembrey and Burry Port Town Council:* The Committee agreed that this would be a positive simplification of building operations that are to be considered "development".

7.37 *Friends of the Earth Cymru:* We agree that any increase in floorspace should require planning permission – the pernicious effect of retail space increases by supermarkets

in ‘mezzanine’ floors is one example of the need to ensure that this is part of the definition of ‘development’. We completely disagree that the GPDO should allow these increases in floorspaces to be permitted development. There should be a consultation on what should and shouldn’t be permitted, as we are of the strong view that additional retail floorspace should not be permitted development.

7.38 *Rhondda Cynon Taf CBC*: Agree - this proposal would simplify current legislation.

Equivocal response

7.39 *Douglas Hughes Architects Ltd.:* The Consultation makes reference that any works to increase the floor space of a building would be regarded as development. We would agree on condition that dwellings are exempt from this suggestion as we do not consider that this could in our opinion inadvertently lead to more, not fewer, complications.

Responses disagreeing

7.40 *Accessible Retail:* We do not agree. Although it unlikely to impact on AR members because the scale of change normally involved is major rather than minor, it does extend the need for permission to all works and goes against the established principle of excluding minor matters from the cost and delay of needing to acquire permission.

7.41 *Huw Evans:* Internal alterations to a building seldom impact on the reasons why planning control is necessary. They should only constitute development where there is a material change of use. To introduce this as development will only give licence to overzealous development managers to interfere and exercise unnecessary control. This takes them away from more important areas of work at a time when resources are tight and unlikely to improve.

Other comments

7.42 *Radio Society of Great Britain:* The definition of development. The RSGB welcomes the fact that it is not recommended that s55(2)(a) of the TCPA Act 1990 should be amended. This relates especially to the provision that works which do not materially affect the external appearance of a building is not development. However, it would be very helpful if it could be stated explicitly that certain types of building works are not development. There is no mention of the concept of ‘de minimis’ and yet, such things as wire aerials suspended from a house to a tree are usually accepted as not being development. There is an anomaly in that whereas standard domestic TV aerials which extend above the roof line on a house never require permission, presumably on the basis that they are not development, satellite dishes are treated as ‘permitted development’ under the GPDO. We would like all aerials mounted on a dwelling below the roof line to be excluded from the definition of development.

CONSULTATION QUESTION 7-3.

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:

(1) **the formation or laying out of means of access to a highway; and**

(2) **the placing or assembly of any tank in any part of any inland waters for the purpose of fish farming there.**

We invite the views of consultees.

Number of responses

7.43 Total: 36 (4 in agreement, 18 equivocal responses, and 14 in disagreement).

Responses in agreement (without further comment)

7.44 Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services

Responses in agreement (with added comment)

7.45 *Rhondda Cynon Taf CBC*: Agree - the proposed inclusion of the word 'normally' would not preclude other types of works.

7.46 *PEBA:* We consider this a sensible proposal to provide greater clarity in the legislative code.

7.47 *Pembrey and Burry Port Town Council*: The Committee agreed that this would be a positive simplification of building operations that are to be considered "development".

Equivocal responses

7.48 *POSW, Monmouthshire CC, Pembrokeshire Coast NPA, National Parks Wales, Ceredigion CC, Carmarthenshire CC, Pembrokeshire CC, Neath Port Talbot CBC:* welcome the definition of 'engineering operations' in the Bill but considers that the proposed definition will cover limited engineering operations only. Landscaping, agricultural works, terracing will not be covered by the definition, they do not always require an engineer but are of significant scale to be classed as engineering operations.

7.49 *Carmarthenshire CC, Pembrokeshire Coast NPA, National Parks Wales:* Therefore to use the wording 'normally supervised' by an engineer – is not appropriate in many development proposals. Many 'engineering operations' in rural areas and on small developments are progressed and overseen on site by the JCB driver – professional engineers are not normally employed at all.

7.50 *Pembrokeshire Coast NPA, National Parks Wales:* The following wording is suggested:- "engineering operations", to the effect that they are operations normally supervised by a person carrying on business as an engineer, and include: (1) the formation or laying out of means of access to a highway; and (2) the placing or

assembly of any tank in any part of any inland waters for the purpose of fish farming there. or (3) any other earth works which exceed 1.5m in depth or cover an area of xx sq m.

7.51 *POSW:* There was the view that this does not go far enough in term of the required clarity.

7.52 *Ceredigion CC:* Query conflict with Highways Act?

7.53 *Neath Port Talbot CBC:* Caution should therefore be exercised in drafting a definition.

7.54 *Pembrokeshire Coast NPA & National Parks Wales:* Could add in some examples of what constitutes an engineering operation - but again a list which isn't comprehensive requires further clarity often and makes further work in any event.

7.55 *Pembrokeshire CC:* The difference between engineering and other operations on land is an area of contention and if engineering operations is to be 'defined' then perhaps other operations should also be.

7.56 *POSW South East Wales, Caerphilly CBC, Cardiff Council:* So much work is carried out without supervision, and while the word 'normally' helps in that respect, would it be better to have an all-encompassing definition , such as the existing ones for industrial development and agriculture, where one is left in no doubt as to what is an engineering operation, e.g. the construction, installation of any structure, including for the support of land or other structure; the creation of any bund or other land form; the formation or laying out of means of access to a highway; the placing or assembly of any tank in, over or under any land or part of any inland waters including for the purpose of fish farming there.

7.57 *Merthyr Tudfil CBC:* Partly agreed. Definition of 'engineering operations' is useful but it only covers limited engineering operations, landscaping, agricultural works, terracing aren't covered but can be of a significant scale to be classed as engineering operations. Earth works which exceed a certain depth (1M) or cover an area of xx sqm should be included; the amounts could be specified in the GDPO.

7.58 *Association of Local Government Ecologists (Wales):* Whilst we agree that defining what is meant by engineering operation would provide clarity we would suggest that the definition be expanded. Currently site clearance works that 'remove' material/ relevant considerations (e.g. biodiversity, trees, soils) could fall outside of this definition. Whilst clearance works to enable agricultural intensification are covered elsewhere there is no catchall to stop anyone clearing a site prior to applying for planning permission. We would suggest that whilst previously, vegetation clearance per se has not been a planning issue such operations certainly have landscape, amenity, health, drainage, biodiversity, pollution and generally land use implications that are not picked up through any other regime, especially where the reason for the clearance is to enable development.

We would wish to see consideration being given to including such operations as 'engineering operations' and requiring permission. As a minimum, engineering operations where earth moving works are involved should remain an engineering operation else development sites would be able to be cleared and levelled before a

planning proposal is even submitted, making it difficult to consider the material/relevant considerations and making it difficult to rectify or require remedial action to address any knock on issues. We also consider that it would be useful to have an associated definition of “de minimis” with regards to pond creation, as planning permission has been required for all pond creation previously. An idea of size before permission would be required would be helpful to promote the installation of wildlife-friendly ponds. Currently small pond creation, largely funded by grants, is hampered by the need for planning permission and the associated costs. Whilst it is felt that a requirement for planning permission to control: larger pond creations, enforce “engineering operations” infilling ponds, and control the pond use (e.g. wildlife use over fish), we feel that a definition of a minimum size for wildlife ponds might be useful**.**

7.59 *Blaenau Gwent CBC:* Agree that definition of the term would be helpful but should not be restricted to “engineer” as works may be unsupervised or overseen by another qualified professional such as an architect.

7.60 *Home Builders Federation:* The HBF supports defining the term ‘engineering works’ but consider the term ‘normally supervised by a person’ still leaves ambiguity.

7.61 *The Law Society:* It is the Society's view that a definition of "engineering operations" should be incorporated, albeit that this need not be an exhaustive definition. However, it is suggested that this should go beyond that currently suggested in the consultation paper. Although this may not be a matter which is frequently litigated, there can be uncertainty amongst applicants as to the scale of works which qualify as an "engineering operation". This is, to an extent, reflected in paragraph 7.30 of the consultation paper which recognises there are some types of landscaping works which could be engineering operations in which would not generally be supervised by an engineer. It would be helpful for there to be clarity as to whether works which could otherwise be considered de minimis would qualify as engineering operations.

7.62 Where the operations do concern an engineer, we note that:

- The categories of engineers are various and rather than using the term “business of an engineer a preferable term may be “a person registered with the Engineering Council”

- We agree with the comment made by Pembrokeshire Coast NPA that in rural areas and on small schemes the supervisor is the person driving the “JCB”. Rather than “normally supervised” therefore a better formulation might be “operations for which the appropriate professional supervisor would be a person registered with the Engineering Council”

7.63 Specific references to highway works and fish farms seem to have been added to resolve uncertainties that appeared from time to time. A power for the Minsters by add other specific categories of works by regulation would make it easier to resolve any future uncertainties that might arise.

Responses disagreeing

7.64 *Institution of Civil Engineers Wales:* Neither definition is necessary.

7.65 *CLA:* The definition of "engineering operations" should remain as per case law. We do not believe there is any need to put a definition on the face of the Bill.

7.66 *Allan Archer:* I think the possibility of qualifying the definition of engineering operations by reference to "operations normally carried out by a person carrying on business as an engineer" may cause some difficulties as small scale engineering operations are often progressed and overseen on site by non-engineers, such as engineering plant operators and unqualified supervisors.

7.67 *CMet Residents Group:* One of the members of our Group who is a Chartered Civil Engineer states that all Developments even down to a small house extension involve design and supervision by some or all members of the Civil, Structural, Mechanical and Electrical Engineering Institutions to name just a few. The inclusion of items (1) and (2) as part of the definition appears completely inadequate. The Institutions' websites provides a more satisfactory definition. The Commission should consult with representatives of these institutions, in this connection.

7.68 *PINS:* PINS are concerned that the proposed definition is not precise enough, and would be open to interpretation and/or abuse. It would be beneficial to clarify, so there is no uncertainty. Should a clear definition not be possible as part of this proposal, in this situation, PINS considers it would not be beneficial to carry forward.

7.69 *National Trust:* National Trust raise the concern that not all engineering operations are completed by an engineer, for example landscaping bunds, car park modifications, trenching for deep excavations would not be covered by the suggested definition for engineering works.

7.70 *RTPI:* We agree with the concerns set out by National Grid [National Trust?] that there are types of engineering works such as landscaping bunds etc that would not be covered by the suggested definition for engineering works. We would recommend an extension to the definitions of 'engineering operations'.

7.71 *Bridgend CBC:* This definition does not go far enough. The point about landscaping not being a form of works that would require supervision by an engineer is a good one. The same goes for site clearance/earthworks in advance of the implementation of consent, perhaps to comply with Ecological windows/licences. There is an opportunity to clarify the nature and level of works that are required to formally implement (and protect) a consent.

7.72 *Newport City Council:* This could exclude a number of operations (which we have previously held to constitute engineering operations). What is 'normally' supervised is unclear and would lead to uncertainty and challenge (ie how big can you did a hole before it should be supervised?). This appears to be over simplification which will introduce more problems. Any definition should also include, tipping, movement and excavation of material, along with retaining works, which has a material impact on the land or upon public amenity. Creating an access to a highway should also refer to widening works.

7.73 *Torfaen CBC:* We do not believe that it would be helpful to define "engineering operations" as "operations normally supervised by a person carrying on business as

an engineer" because plenty of engineering operations are carried out by people that are not engineers e.g. landscaping works, hardsurfacing works etc.

7.74 *Sirius Planning:* We consider the proposed definition for engineering works is too vague and often by providing examples, decision makers conclude that one of these examples must be satisfied rather than considering the wider definition.

7.75 *Canal & River Trust:* We suggest that the definition should be left in case law. It is worth noting that a civil engineer will often oversee a building project, i.e. a project involving building operations, so reference to "operations normally supervised by a person carrying on business as an engineer" could introduce confusion.

7.76 *Keith Bush:* Attempting to define "engineering operations" would lead to confusion as this term has already been sufficiently defined within case law.

CONSULTATION QUESTION 7-4.

We provisionally propose that there should be an explicit provision as to the approval of use classes regulations by the negative resolution procedure. Do consultees agree?

Number of responses

7.77 Total: 28 (26 in agreement, 1 equivocal response, and 1 other).

Responses in agreement (without further comment)

7.78 Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire CC, PINS, National Trust, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, The Law Society, Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Equivocal responses

7.79 *Merthyr Tudfil CBC, Torfaen CBC:* We weren't sure what was meant by this question.

Other comments

7.80 *The Law Society:* However, more generally in terms of change of use, the Society thinks that the opportunity could usefully be taken to reflect the principle of a "planning unit" without seeking to define it or a material change of use further. It is not, strictly, correct that it is always development where there is any material change in the use of "any buildings or other land" (especially as building is defined to include parts of a building). The planning unit principle has developed to recognise that there are many situations in which use of whole, or parts of, buildings does not result in a change of use which qualifies as development for planning purposes. It is, therefore, more accurate to state that it is development where there is a material change in the use of any planning unit.

CONSULTATION QUESTION 7-5.

We provisionally propose that section 55(3)(a) TCPA 1990 (intensification of dwellings as material change of use) should 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. Do consultees agree?

Number of responses

7.81 Total: 36 (27 in agreement, 3 equivocal responses, 6 in disagreement).

Responses in agreement (without further comment)

7.82 Andrew Ferguson, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Penstrowed Community Council, Allan Archer, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, PINS, National Trust, RTPI, Newport City Council, Torfaen CBC, The Law Society, Lawyers in Local Government, Friends of the Earth Cymru, Keith Bush, Huw Williams (Geldards), PEBA

Responses in agreement (with additional comment)

7.83 *Neath Port Talbot CBC:* Agreed. The merging of two dwellings into one should be considered as a change of use.

7.84 *Central Association of Agricultural Valuers:* We agree that consistency of approach is desirable and since there may be significant planning consideration to take account of in some cases, we agree that a change in the number of dwellings within a building should be considered a material change of use.

7.85 *Ceredigion CC, Pembrokeshire CC, Carmarthenshire CC:* Agreed. And should same be applied to bedrooms in hotels? Hostels? Self-catering accommodation?

Equivocal responses

7.86 *Caerphilly CBC, POSW South East Wales & Cardiff Council:* Yes, but should consideration be given to designating a change from a number of dwellings into one dwelling as permitted development, on the basis that this would usually mean less activity at the combined property. Where the loss of dwellings would be an issue, LPAs could serve article 4 directions.

Responses disagreeing

7.87 *Douglas Hughes Architects Ltd.:* We do not consider that there is merit in changing the provision whereby two dwellings into one needs planning permission. In the spirit of what is trying to be achieved here – simplification – this is one of the areas that does not require improvement.

7.88 *CLA:* No. Subdividing a dwelling into two currently requires planning permission but amalgamating two into one does not. Para 7.52 suggests the latter should not require planning permission as a material change of use which is, unintentionally perhaps, more restrictive.

7.89 *Sirius Planning:* We disagree with the proposal to categorise a change in the number of dwellings in a building as a material change of use. Whilst increasing the number of dwellings in a building often leads to the intensification of (the same) use and therefore has planning implications, the reduction in the number of residential units in a building will deintensify the use, regardless of planning merits, and should not therefore enter statute as a material change of use.

7.90 *Bridgend CBC:* No. The requirement for planning permission has normally revolved around the nett creation of new residential units. The amalgamation of two flats back into one dwelling (or one bigger flat) should not require planning permission as it is unlikely to have a negative effect on the environment or the appearance of the building. This would also not be wholly consistent with the recent additional Use Class for HMOs (C4) where there is a permitted change back to a dwelling (C3).

7.91 *Huw Evans:* What's the point? What does this achieve? This seldom gives rise to a significant planning issue and only serves to make the planning system even more regulatory. There should be a focus on de-regularising the system and not adding to it.

7.92 *Rhondda Cynon Taf CBC*: Disagree - it is not considered that the statement made in paragraph 7.52 – 'if a change in one direction is defined to be material, it must logically follow that an identical change in the opposite change is equally material' reflects current planning practice. It is considered that in reality, there would be very few occasions (if any) where for example, a change from two dwellings to one would result in a material change in use and therefore the proposed change to section 55(3)(a) would lead to greater uncertainty and the submission of unnecessary planning applications.

Other comments

7.93 *Radio Society of Great Britain:* It is noted that it is not proposed to change the wording of s55(2) as mooted in paragraph 7.49. The RSGB would prefer that the wording 'incidental to the enjoyment of the dwelling(house) as such' remains as it is. It is a well understood concept. Amateur radio is precisely that. We would not favour the wording in para. 7.49.

CONSULTATION QUESTION 7-6.

We provisionally propose that section 55(2)(d) to (f) of the TCPA 1990 (activities not falling under development) 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 an order 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 order, of any part of the buildings or the other land, from that use to any other use within the same class.**

Do consultees agree?

Number of responses

7.94 Total: 33 (31 in agreement, and 2 others).

Responses in agreement (without further comment)

7.95 Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Neath Port Talbot CBC, National Trust, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire CC, PINS, Newport City Council, Bridgend CBC, Huw Evans, Lawyers in Local Government, Keith Bush, PEBA

Responses in agreement (with additional comment)

7.96 *RTPI, Allan Archer:* I agree with the point made in the report that it is the change of use which may constitute development, if it is material, and I support the addition of the words “change of” in this provision. As far as proposal (1) is concerned, I see no reason advanced for dropping the words “any buildings or other” in front of “land” and since this is the form of words used in s55(1) I would strongly support its retention. I agree with proposal (2) as worded. As far as proposal (3) is concerned I agree with the changes to wording proposed.

7.97 *Caerphilly CBC, POSW South East Wales & Cardiff Council:* Yes, although in (1) to avoid confusion would ‘use of land’ be better than ‘the change of use of land…’ because if the use is incidental there would be no material change of use.

7.98 *Association of Local Government Ecologists (Wales):* Whilst we do not wish to suggest any changes to the suggested list we would like to ensure that point 2 is not intended to include horsiculture. The use of land to keep or graze horses can have significant environmental effects. The definition of agriculture does not currently include this type of animal grazing and as such the change to this type of use is not covered by other regimes. We would therefore welcome the change of use to horsiculture be considered as relevant to the planning regime.

7.99 *Torfaen CBC:* Yes, although does (1) actually constitute a 'change of use'? Or is it simply the 'use of land'?

7.100 *The Law Society & Huw Williams (Geldards):* We agree in all three cases (but query, in line with the proposed policy for secondary legislation, whether at (3) the correct terminology should be "Use Classes Regulations".

7.101 *Rhondda Cynon Taf CBC*: Agree - the proposed changes would provide greater clarification.

Other comments

7.102 *Glamorgan Gwent Archaeological Trust:* Other changes of use that are not material: We would be concerned if the proposal led to negative impacts on the historic environment, there is a potential for adverse impacts as land-use change could occur without the applicant being made aware, if they were not already aware, that there is a historic asset within the area, or negatively by management practices regarding agriculture or forestry for the same reason.

7.103 *Chartered Institute for Archaeologists:* No comment, save that

- the potential effect of such changes on the setting of historic assets needs to be addressed. Changes of use may not necessarily involve direct interference with the fabric of historic assets but can have far-reaching effects upon the setting of such assets and hence their significance

- some thought might also be given as to how it might be possible better to control some agricultural activities through the planning regime, given the potential for damage to historic assets with archaeological interest through activities such as ploughing (and given the current system of Class Consents which potentially allows this to happen even in the case of scheduled monuments).

CONSULTATION QUESTION 7-7.

We provisionally propose 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. Do consultees agree?

Number of responses

7.104 Total: 25 (24 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

7.105 Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, PEBA, Cardiff Council

Responses in agreement (with additional comment)

7.106 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC:* Agreed, however the ways in which planning permission can be granted will have to be set out through the appropriate sections in the Bill.

7.107 *Carmarthenshire CC:* Change is unclear as it notes those provisions will not be re included but it then goes on to say not restated in their current form?

7.108 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes. It is declaratory only and not exhaustive but will need signposting as per para 7.58 of the consultation.

7.109 *PINS:* This would not appear to impact on the work of PINS, though there is no obvious issue with this proposal.

Responses disagreeing

7.110 *Keith Bush:* Disagree – if the Code is to be effective, it should include a provision which fully lists the means of obtaining planning permission.

CONSULTATION QUESTION 7-8.

We provisionally propose 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. Do consultees agree?

Number of responses

7.111 Total: 30 (28 in agreement, and 2 equivocal responses).

Responses in agreement (without further comment)

7.112 Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Theatres Trust, Pembrokeshire CC, PINS, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Equivocal responses

7.113 *Carmarthenshire CC:* Unsure. This relates to applicability of pre-1947 legislation. This does need to be addressed somewhere.

7.114 *Huw Evans:* Caution as this may impact on application for certificates of lawfulness.

CONSULTATION QUESTION 7-9.

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. Do consultees agree?

Number of responses

7.115 Total: 34 (30 in agreement, 1 equivocal response, and 3 in disagreement).

Responses in agreement (without further comment)

7.116 Pembrey and Burry Port Town Council, Institution of Civil Engineers Wales, Penstrowed Community Council, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, PINS, Newport City Council, Chartered Institute of Architectural Technologists, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Huw Evans, Friends of the Earth Cymru, Keith Bush, PEBA, Huw Williams (Geldards), Cardiff Council

Responses in agreement (with additional comment)

7.117 *RTPI:* We agree to the deletion of s88 and s89 of the TCPA 1990 (planning permission granted by enterprise zone schemes). See our response to questions 5.12 and 16.8.

7.118 *POSW, Monmouthshire CC, Pembrokeshire CC, Andrew Ferguson:* Agreed a Local Development Order can achieve the same outcome.

7.119 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes, this is agreed on the basis it has not been used and there is an existing procedure which achieves the same result

7.120 *Chartered Institute for Archaeologists:* Yes. As stated above, mechanisms which by-pass the normal application procedures for planning permission carry significant risks for the historic environment.

7.121 *Rhondda Cynon Taf CBC*: Agree - similar results could be achieved through an LDO.

Equivocal responses

7.122 *Blaenau Gwent CBC:* Do not disagree but there may be Welsh Council's actively considering SPZ.

Responses disagreeing

7.123 *Accessible Retail:* We oppose this for the reasons given in our answer to question 5-12.

7.124 *Carmarthenshire CC, Ceredigion CC:* Agree that a Local Development Order can achieve the same outcome, but query whether this should be retained for flexibility

maybe? WG may need various tools to implement policy changes – this could be one of them? Planning often criticised for being too slow – to be swift, if the legal framework is already in place then such solutions can be used more quickly. Will Brexit challenge the way we need to do planning in the future?

CONSULTATION QUESTION 7-10.

We provisionally propose that sections 82 to 87 of and Schedule 7 to the TCPA (simplified planning zones) should not be restated in the new Planning Bill. Do consultees agree?

Number of responses

7.125 Total: 34 (32 in agreement, 1 equivocal response, and 1 in disagreement).

Responses in agreement (without further comment)

7.126 Institution of Civil Engineers Wales, Penstrowed Community Council, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, PINS, Newport City Council, Chartered Institute of Architectural Technologists, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Friends of the Earth Cymru, Keith Bush, PEBA, Huw Williams (Geldards), Cardiff Council

Responses in agreement (with additional comment)

7.127 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes, this is agreed because there is an existing procedure which achieves same result

7.128 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC:* Agreed, a Local Development Order can achieve the same outcome

7.129 *RTPI:* We agree to the deletion of sections 82 to 87 and schedule 7 of the TCPA 1990 (simplified planning zones) as again these provisions have had limited use in Wales and more suitable alternatives exist, including Local Development Orders.

7.130 *Huw Evans:* Agree. These were seldom used and I am only aware of the zone in Flint which has now expired. A simplified planning zone is an admission that the planning system is too complicated! The same applies to Enterprise Zones. If employment policies and economic circumstances were given proper weight in the decision making process then there is no planning reason for them. They are a simplified tax and incentive measure not a planning consideration.

7.131 *Chartered Institute for Archaeologists:* Yes. As stated above, mechanisms which by-pass the normal application procedures for planning permission carry significant risks for the historic environment.

7.132 *Allan Archer:* I agree that it seems extremely unlikely that SPZs will ever be used and I support this proposal.

7.133 *Rhondda Cynon Taf CBC*: Agree - similar results could be achieved through an LDO.

Equivocal responses

7.134 *Carmarthenshire CC:* Should this be left in for flexibility maybe? WG may need various tools to implement policy changes – this could be one of them? Planning often criticized for being too slow – to be swift, if the legal framework is already in place then such solutions can be used more quickly.

Responses disagreeing

7.135 *Accessible Retail:* We oppose this for the reasons given in our answer to question 5-12.

CONSULTATION QUESTION 7-11.

We provisionally propose 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 light of general and local development orders, but not to enterprise zone or simplified planning zone schemes). Do consultees agree?

Number of responses

7.136 Total: 33 (32 in agreement, 1 other response).

Responses in agreement (without further comment)

7.137 Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Penstrowed Community Council, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Theatres Trust, Pembrokeshire CC, PINS, National Trust, Newport City Council, Torfaen CBC, Mineral Products Association, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council

Responses in agreement (with additional comment)

7.138 *The Law Society:* We agree. The change of emphasis would be welcome. However, given that the relevant time limits are derived from the ability of an LPA to take enforcement action it is likely that there will still need to be some cross-referencing between these provisions and the provisions relating to enforcement.

7.139 *Radio Society of Great Britain:* Agree. The Certificate of Lawfulness procedure is often by amateur radio enthusiasts who have erected aerial systems for more than 4 years without permission.

7.140 *Huw Williams (Geldards): Agree*. The change of emphasis would be helpful and welcome.

7.141 *Rhondda Cynon Taf CBC*: Agree - this would provide greater clarity and more appropriate use.

Other comments

7.142 *PEBA:* We invite the Commission to consider whether provision should be made to impose a specific period within which an appeal must be initiated from a local planning authority's determination of an application for a lawful development certificate.

CONSULTATION QUESTION 7-12.

We provisionally propose that a provision should be included to the effect that:

(1) **an application for planning permission for an operation or change of use be assumed to include an application for a certificate of lawfulness of proposed use or development (CLOPUD) in relation to the operation or change of use; and**

(2) **an application for planning permission to retain an operation or change of use already carried out without permission is assumed to include an application for a certificate of lawfulness of existing use or development (CLEUD) in relation to the operation or change of use.**

Do consultees agree?

Number of responses

7.143 Total: 42 (18 in agreement, 4 equivocal responses, and 18 in disagreement).

Responses strongly in agreement

7.144 *Radio Society of Great Britain:* The RSGB is strongly in support of this proposal. Although permitted development rights for aerials are woefully limited they do apply. This should also cover instances where the proposal would not amount to development.

Responses in agreement (without further comment)

7.145 Friends of the Earth Cymru, Keith Bush, Newtown and Llanllwchaiarn Town Council, Mineral Products Association, Institution of Civil Engineers Wales, CLA, Glamorgan Gwent Archaeological Trust, Theatres Trust, PINS, National Trust, PEBA

Responses in agreement (with additional comment)

7.146 *Central Association of Agricultural Valuers:* We view this as a pragmatic approach to regularising development without planning consent.

7.147 *Sirius Planning:* We support the proposal to combine the application for a certificate of lawfulness with an application for planning permission. This should ensure greater cooperation between applicants and the planning authority.

7.148 *Michael Kiely:* Good idea that one can be issued on a planning application – as was the case with the old s53 determinations. However, what about having a clear process for being able to convert a Certificate application into an application for PP. At the moment it's all a bit unclear and determining a Certificate application with "Not PD" and then requiring another application is a bit bureaucratic. My suggestion for prospective developments (retrospective is dealt with below under enforcement notices) is that a certificate application is unnecessary and only applications for planning permission should be made with three potential outcomes:

- If PD, a s192 certificate is issued (half the fee is refunded)
- If acceptable, planning permission is granted
- If unacceptable, planning permission is refused

If the applicant disputes a "not PD" decision that can be part of the appeal grounds.

7.149 *Huw Evans:* Agree. An application for a proposed development or the retention of an existing operation or change of use should be assumed respectively to include an application for a CLOPUD or a CLEUD.

7.150 *Huw Williams (Geldards)*: Agree. This is a welcome proposal and should result in greater certainty and simplification. However, I suggest that further consideration should be given as to whether such a deemed certificate application should automatically form part of a retrospective planning application, particularly if it is in response to an enforcement warning notice. It seems to me that there could be a risk of unlawful development being unintentionally regularised through retrospective applications if they included a certificate application.

7.151 *Rhondda Cynon Taf CBC*: (1) Agreed – this already occurs in practice and in such cases, applicants are advised of the position, requested to 'convert' the application to a CLOPUD and refunded half the application fee. (2) Agreed in principle, however in the case of CLEUDs, there may need to be a requirement for the applicant to submit further evidential information in support of the previous use to enable the application to be determined.

Equivocal responses

7.152 *RTPI:* While we understand the principle behind this provision, we have concerns regarding its practicalities and note that the consultation document acknowledges that the detail needs to be thought through so that it would not add further complication or bureaucracy.

At present, those formulating proposals are able to draw on many sources of advice to help them consider whether or not a planning application is required, including Welsh Government guidance, LPA guidance, Planning Portal, informal discussions with planning officers at pre-application stage, formal pre-application consultation as

well as advice from their own professional advisors. We would hope that the question of whether or not a particular proposal requires a planning application to be submitted would, in the vast majority of cases, be sorted out at an early stage. Where there is any doubt or disagreement, an application for a Certificate of Lawfulness could be submitted.

However, we recognise that it is possible that the question may not be addressed or recognised at the pre-application stage and a planning application is submitted for something that does not require the specific grant of planning permission from the LPA. We would then expect those cases to be identified either at validation stage or by the case officer early in the process.

Bearing in mind the extract from *Wells v Ministry of Housing and Local Government* at paragraph 7.94 of the consultation document we would be interested to hear the evidence and justification for this proposal, particularly given the Law Commission's uncertainty of how it might work in practice.

There are a number of practical factors to consider, including: How should such applications be processed, assessed and determined? Would the planning application provide sufficient information to determine the matter, given the onus is on the applicant to provide the information and to prove the lawfulness of the operation(s) or change(s) of use involved. We question whether concerns could be better addressed through guidance in the Welsh Government's Development Management Manual?

It is clear that the earlier in the process the decision on lawfulness is taken the better the intention is to avoid wasted time and effort, however we raise concerns that, in practice the proposal set out in the consultation document would lead to greater bureaucracy and that the objective could be achieved by other means, as mentioned above.

7.153 *Neath Port Talbot CBC:* Mixed response –The logic is understood but careful consideration needs to be given to changes to ensure that they do not introduce further complication. In practice planning officers should be carefully considering upon submission whether a development which is the subject of a planning application does indeed require planning permission. If not they should be giving the applicant the opportunity to convert it into a Cert of Lawfulness. They should not be determining it as a planning application if it is indeed permitted development as that would be perverse.

It is however understood that there are times when elements of a development included on a planning application require planning permission and other elements which are permitted development. Good practice would suggest that even if an applicant has only applied for planning permission for a two-storey extension but the plans also include a single storey extension which is not permitted development the planning officer should seek permission from the owner to include that additional element of the works within the description of development. The opposite would also be the case i.e. some parts of the development would be removed from the description if they were permitted development.

In theory, a reasonable person would assume that all other proposed development either internal or external on the submission which is not included within the (updated) description of development is permitted development. However at the present time they only get a decision from the council on the elements that need planning permission, although the use of an informative can give further clarity. I can understand that this is confusing for those applicants who have submitted an application for a comprehensive set of proposals but only get a decision for part of their scheme (as only part of it needs planning permission). Therefore it is agreed that there should be provisions to ensure that the remainder of the development is by default covered by a certificate of lawfulness. This could form part two of the decision notice? If there are elements of a development which require planning permission and which are not acceptable, these can be removed by means of a condition. E.g. notwithstanding this planning permission, the raised decking shown on drawing number ** does not form part of this planning permission…

In terms of the certificates of lawfulness process in general, this needs to be simplified as the format is very complicated at present (unnecessarily so).

I don't believe that this would result in fee implications as CLOPUDs for development are still likely to be submitted. This method would only relate to developments which include a mix of non-permitted and permitted development, although it may well be the case that we have completely misunderstood your proposal and therefore your question…

7.154 *Blaenau Gwent CBC:* In acknowledging the counter argument that it confuses LDC and planning application processes, the proposal is supported. It is becoming widespread practice for LPAs who receive applications for planning permission that are PD to issue LDCs in their stead. This allows the applicant to have formal recognition of the scheme being lawful whilst allowing the LPA to retain fees for work already undertaken. It has the benefit of the LPA acknowledging lawfulness but not "approving" such development.

7.155 *The Law Society:* Whilst the Society agrees with this in principle, it should be highlighted that there will need to be clarity, probably in Regulations, as to whether an applicant will be given the opportunity to supplement an application in the event that the Council considers that either type of certificate could, in principle, be granted.

It is unusual for most planning applications to be accompanied with the type of supporting evidence which would be necessary, in many cases, to justify the grant of a relevant certificate. It would be unfortunate if this change resulted in applicants deeming it necessary to include that type of evidence in all cases, for fear of otherwise losing the benefit of these provisions.

Furthermore, consideration should be given as to whether such a deemed certificate application should automatically form part of a retrospective planning application, particularly if it is in response to an enforcement warning notice. There may be a risk of unlawful development being unintentionally regularised through retrospective applications if they included a certificate application.

Responses disagreeing

7.156 *Pembrokeshire Coast NPA & National Parks Wales:* Disagree. It appears that this would lead to a complication of the existing system. The Authority has concerns in respect of retrospective applications which are approved on a temporary permission; a local planning authority may inadvertently make a development, which should be removed within a certain time period, lawful.

7.157 *Caerphilly CBC and POSW South East Wales:* No. The CLEUD/CLOPUD process as currently formulated is a simple fact-based way for a landowner, developer or purchaser of land to establish what development is or could be lawful, without any consideration of the planning merits of the development. Combining it, whether partially or wholly, with the mainstream planning application process will only complicate matters unnecessarily.

7.158 *POSW, Monmouthshire CC, Ceredigion CC:* Disagree. It appears that this would lead to a complication of the existing system. There would be fee implications if the applications were combined.

- POSW has concerns in respect of retrospective applications which are approved on a temporary permission; a local planning authority may inadvertently make a development, which should be removed within a certain time period, lawful.

- The detail provided within a planning application is nothing like the requirements for a CLEUD. There are examples where CLEUDs cannot be granted as insufficient evidence forthcoming; but would be granted planning permission as in accord with policy.

7.159 *Ceredigion CC:* Doesn't this have implications for council tax collection too? Seven years back payment for tax and water rates etc?

7.160 *Merthyr Tudfil CBC:* Disagree. The current system works, it doesn't need to be changed. If PP is applied for but doesn't require consent, the officer states that in their report.

7.161 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* No, and disagree on the following points. 7.12 (1) this provision may be onerous because of the need to looking at two separate issues? (2) there be may be grounds to grant planning permission but there may not be any or sufficient evidence to issue a CLEUD.

7.162 *Pembrokeshire CC:* Disagree. This would lead to a complication of the existing system.

(1) PCC has concerns that the proposal would generate a substantial amount of work (a certificate application for every planning application) with no additional fee income. This additional work would be disproportionate to the small number of cases where an applicant might apply for permission for something that could be granted a certificate. The vast majority of

planning applications would generate a refusal of a certificate and the administrative cost would be excessive.

(2) Comment as (1), Retrospective planning applications would be unlikely to contain information about the past use of a site and therefore the majority of deemed certificate applications would be likely to be refused on the grounds of lack of evidence. Applications for certificates and planning applications are quite different processes involving different evaluations highlighting the need for separate application processes.

7.163 *Newport City Council:* No. This confuses the issue of acceptability and lawfulness. Pre-application advise is available to informally establish whether development is permitted. There could be a new mechanism introduced whereby application types could be changed and 'top up' fees paid during the determination process if it is clear the applicant has applied for the wrong type of permission (i.e. a development is not permitted and should have been submitted as a 'full' proposal). This assessment of permitted development should not be an assumed duty. Assessing if development is lawful at an early stage adds additional burden and invites challenge.

7.164 *Torfaen CBC:* No. The two applications are completely different – one is fact-based, and the other merit-based. They should not be confused. The onus should not be placed on the LPA to decide if a proposal submitted as a planning application is actually lawful. However, there could be non-legislative guidance advising LPA's 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. In circumstances where it is not obvious that a development is lawful, but as the planning application progresses, it is clear that the development is likely to be lawful, then this should be given due weight as part of the assessment/consideration of the application.

7.165 *Bridgend CBC:* No - This would mean that every application for consent is also an application for a certificate. Different law applies to each and the consideration of a certificate requires evidence as to the historic use of the site or the history of operational development which we would not ask for on a planning application. Would LPAs have to issue two decision notices on every application?

If we were going to approve an application for consent with conditions do we also have to consider if, in fact, it is lawful and therefore no conditions can be imposed?

This will be an unnecessary burden on Officers and this would and also create confusion for Members, if an application is referred to Planning Committee, and for objectors, where we turn down a planning application but grant a certificate which has not been requested by the applicant. This is likely to cause confusion where applicants specifically want a planning permission rather than a certificate.

In addition, some elements of the proposal (or retrospective application) may not require planning permission or are immune from enforcement action but other elements will. Officers routinely review the lawfulness of a development or proposal and include that consideration within the body of their reports.

It would be preferable to say that if they apply for consent that means a certificate cannot be requested until the relevant time limits (4 years or 10 years) has passed from the date of the application.

7.166 *Andrew Ferguson:* I disagree that an application for PP should automatically be deemed to include an application for a certificate. It is not overly clear how this would work in practice in any event. Does it mean that if a proposal is lawful, that an LDC is issued as well as, or instead of planning permission? This effectively means that all applications would have to be considered / assessed on the basis of whether they are lawful or not in the first instance and secondly whether they are acceptable in planning terms which would delay the consultation process or alternately render it obsolete if letters are sent? There will be a lot of cases where it is not clear cut whether a proposal is/ isn't lawful but the actual planning merits are acceptable. This would increase the workload on LPAs in the first instance and it is not necessarily clear whether there is a right of appeal against both decisions and the resultant impact of this. This approach would also make it more difficult for members of the public to understand what is being considered as part of an application, especially when they object to something but it is subsequently considered lawful.

Conversely, a LPA may make a judgement call on lawfulness on a scheme where the planning merits are considered unacceptable or there is significant objection and there would be no 3rd party right of challenge apart from JR – they would have no say in the process despite being asked for comments. This could result in the decision-making process appear less transparent. In addition, a LDC would only be valid at that time and subject to changes in the GPDO whereas the permission would remain live for 5 years for commencement – the applicant may not want to commence immediately and may prefer PP rather than a certificate…may have to apply again at a later date if things change.

It is not considered that this is a problem as applicants have the right to submit whatever application they like and there have been instances where someone has been advised it is likely to be PD, only for a condition on a previous consent to have removed that right.

The fact a fee may be refunded (after consultations have been undertaken etc) further suggest there are problems to this approach. Returning fees incurs costs to the Council and it is likely that they would just approve the application.

It would seem easier to clarify in the Code that where a proposal would be classed as PD, it should be granted with conditions commensurate with the GPDO as this approach would solve this problem.

7.167 *Allan Archer:* I note that the Commission's report recognises that this proposed change would need to be thought through in detail to ensure that it leads to simplification rather than greater bureaucracy. Having thought about how this might work in practice, I have some reservations about this proposal and do not support it as set out.

The objective, as I see it, is that proposals which do not require the specific grant of planning permission by the planning authority (because they do not involve development or have planning permission by other means, e.g. permitted

development) do not get submitted as an application for planning permission or, if they do, that the planning authority identifies them and returns the application and fee.

At present, those formulating proposals are able to draw on many sources of advice to help them consider whether or not a planning application is required – WG guidance, planning authority guidance, Planning Portal, discussions with planning officers at pre-application stage, formal pre-application consultation as well as advice from their own professional advisors. One would hope that the question of whether or not a particular proposal requires a planning application to be submitted would, in the vast majority of cases, be sorted out, one way or another, before an application is submitted.

Where there is any doubt or disagreement, an application for a Certificate of Lawfulness could be submitted – but these should only be required in a small minority of cases..

However, it is possible that the question may not be addressed or recognised pre-application and a planning application is submitted for something that does not require the specific grant of planning permission from the planning authority. I think it is reasonable to expect this to be identified either at validation stage or by the case officer early in the process – particularly bearing in mind the extract from Wells quoted in the report. I am not aware of any evidence of unnecessary applications being knowingly processed or that planning authorities accept such applications so that they can pocket the fee.

Consequently, I wonder if there is any real justification for this proposal, particularly in the absence of any thought as to how this might work in practice. I think that any concerns about the current situation could be simply addressed through very clear guidance in the WG's Development Management Manual.

What might the practical implications be?

Firstly, if an application for a CLOPUD or CLEUD is assumed to be included in an application for planning permission then how should that be processed, assessed and determined? Would the planning application provide sufficient information to determine the matter? – the onus appearing to rest with the applicant to provide the information (s191(4) and s192(2)) and to prove the lawfulness of the operation(s) or change(s) of use involved. Information requirements to deal with the deemed application for a certificate of lawfulness would have implications for the information requirements considered in 8.1.

Secondly, would the planning authority issue a decision notice for the Certificate of Lawfulness and when would the decision be taken. It seems to me that the earlier in the process the decision on lawfulness is taken the better if the intention is to avoid wasted time and effort – perhaps as part of validation. I can well imagine, therefore, that this proposal would introduce greater bureaucracy to the initial planning application processing stage. Would some documentation of assessment and decision making be needed? – one would think so – and would a formal notice of decision be required?

In conclusion, I am not convinced that this proposal is necessary and I think that in practice it would lead to greater bureaucracy and resources and that the objective could be achieved by other means.

7.168 *Canal & River Trust:* This could add further complexity to the process and as an applicant we don't see it as necessary.

7.169 *Cardiff Council*: No. The CLEUD/CLOPUD process as currently formulated is a simple fact-based way for a landowner, developer or purchaser of land to establish what development is or could be lawful, without any consideration of the planning merits of the development. Combining it, whether partially or wholly, with the mainstream planning application process will only complicate matters unnecessarily. Do not agree with the proposal for the reason stated above. Also, could this be an opportunity to give consideration to the acceptability of the time-limits associated with lawfulness.

CHAPTER 7: GENERAL COMMENTS

7.170 *National Grid:* The principle of removing exemptions, providing clarity about development, and extending Permitted Development rights is supported in principle. Care will need to be exercised in both the drafting, and the timing, of revisions to ensure that the general ambitions of this proposal do not result in an increased regulatory burden after the transition. Whilst this point is important to the economic and efficient operation of the national energy networks, the need for these revisions to be drafted with certainty, clarity and without increasing costs and complexity for applicants will apply to a wide range of residents, companies and employers who benefit from Permitted Development each year. [7-1, 7-2, 7-5].

The range of changes proposed in Chapter 7 are supported, and have the potential to support a forward-looking planning system that is simpler for the users. The detail of how those changes are brought into effect will be import. With that in mind, it may be useful for draft secondary legislation linked to these changes to be accompanied by the draft revised General Permitted Development Order. This would enable the combined effect of the legislative effect to be clear to all consultees, and have the additional benefit of enabling a range of comprehensive changes to be brought in as smoothly as possible. [7-9 - 7-12]

7.171 *UK Environmental Law Association:* We agree that a number of challenges have emerged in defining 'development' in recent times and that the legal response has often resulted in complexity. Any measures to address this would be welcome.

Permitted development rights

7.172 *Andrew Ferguson:* It should be clarified whether the C4 use class has PD rights to extend. It is assumed they do but it is not clear. However, HMOs above 6 people would not benefit from PD rights.

7.173 *Eric Franklin:* I and many others take part in sustainable land use schemes to provide food whilst also conserving nature. I believe the new planning law for Wales should

allow some development on ALL holdings of land for food production and/or nature conservation. The present law allows development only on agricultural sites over 5 hectares. This is arbitrary. The need for sustainable local food production post-Brexit, especially in Wales, with its small fertile areas in valleys and other restricted terrain will be more important than ever. Not unlike the wartime use of domestic gardens and town parks for food production.

Hence my request that there be PERMITTED development of agricultural buildings, for instance on BUILDINGLESS remnants of farms, often bought by Permaculturists, on sites of all sizes, including the smallest, not just those over 5 hectares. At present, 0.093 of the area of a site OVER 5 hectares attracts PERMITTED development. The figure is obviously arbitrary. I suggest it be increased to 1% and that more be allowed subject to special planning permission.

One other request: it seems obvious that some arbitrary restrictions should be abolished. An example is the provision that a domestic building can only be extended by 0.5 of its area in 1949. The allowed extension should in any case be an absolute area, not a proportion, which only increases the irrational disparity between tiny properties and mansions. Today's housing needs, especially for first-time buyers, makes the removal of the restriction imperative. Affordable but tiny properties could then be extended as young couples need to accommodate children despite being unable to afford larger properties. There could also be Permitted Commercial Use for some domestic properties so that small traders/the self-employed could more freely be able to afford a home, and then earn a living in it.

We do hope that the new legislation will ease the process of Wales becoming more self-sufficient by making tiny agriculture/permaculture operations easier by extending PERMITTED DEVELOPMENT to ALL small sites. That will be a great victory for those who want to live sustainably against the current (often CORRUPT!!!) opposition from Local Planning Authorities who claim to support the movement towards sustainable living/growing, yet in reality still fight against it, eg Pembrokeshire, where we have an ecological scheme for permaculture that suffers continual deliberate MISFEASANCE IN PUBLIC OFFICE by the DIRECTOR of the LPA, sometimes in person. There may be clandestine origins for this behaviour on his/its part. We would not allege this if we did not hold DOCUMENTARY PROOFS of our assertion. The request for the absolute right to develop the buildings necessary for small-scale agriculture/permaculture/sustainable food production with nature conservation on the buildingless remnants of farms is surely indicated, and ESSENTIAL to the new circumstances post-Brexit. Please enact this for us all.

Applications for notification under the GPDO

7.174 *Blaenau Gwent CBC:* Abandon/Simplify/Issue Guidance of all parties on all forms of prior notification under the GDPO. Agricultural, telecoms and other prior notifications cause confusion for members and the public and the system is abused by those it was designed to assist.

7.175 *Andrew Ferguson:* Clarify whether conditions can be attached to Prior Notification applications? One of the TANs suggest they can be but it is not apparent how conditions can be attached to something granted through a Development Order (whereby the details are submitted to the LPA for consideration).

Mining operations

7.176 *Mineral Products Association:* Paragraph 7.31 refers to the term "mining operations" and indicates that this will replace the term "winning and working of minerals". As referred to below, a definition of mining operations is needed and this should be carried out in consultation with the mining industry. Further, and with reference to the use of land a review of the concept of each individual shovel full being an individual act of development should be considered. If minerals are to remain part of the land use planning system, their development should be regarded as a "use of the land".

Agriculture

7.177 *Michael Kiely:* Should the use of land for agriculture still be outside of planning control? In this context "land" includes a building, therefore using a house or factory for growing a crop (eg cannabis!) does not constitute a material change of use (breaches many other laws though). I actually had a real case where a warehouse was being used for growing Chinese vegetable hydroponically for the Soho restaurant trade. Didn't feel right that this was completely outside of planning control. If removing it altogether is too big a change, perhaps it should refer to "open land" so that buildings and their curtilages are removed from this exception.

Chapter 8: Applications to the planning authority

CONSULTATION QUESTION 8-1.

We provisionally consider that the law as to planning applications could be simplified, by:

(1) **abolishing outline planning permission;**

(2) **requiring that every application for planning permission for development – whether that development is proposed, or is under way, or has been completed – being accompanied by plans, drawings and information sufficient to describe the proposed development;**

(3) **enabling the items to accompany applications to be prescribed in regulations, so as to include (so far as relevant) details of:**

- **the approximate location of all proposed buildings, routes and open spaces,**
- **the upper and lower limit for the height, width and length of each building proposed, and**
- **the area or areas where access points will be situated;**

(4) **an applicant being able to invite the planning authority to grant permission subject to conditions reserving for subsequent approval one or more matters not sufficiently particularised in the application;**

(5) **an authority being able (whether or not invited to do so) to grant permission subject to such conditions; and**

(6) **an authority being able to notify the applicant that it is unable to determine an application without further specified details being supplied.**

Do consultees agree?

Number of responses

8.1 Total: 65 (27 in agreement, 4 equivocal responses, 32 in disagreement, and 2 others).

Responses in agreement (without further comment)

8.2 Institution of Civil Engineers Wales, Monmouth Town Council, Keith Bush

Responses in agreement (with additional comment)

8.3 *PINS:* Yes, PINS cannot foresee any issue with this proposal.

8.4 *Pembrokeshire Coast NPA, National Parks Wales, Rhondda Cynon Taf CBC, POSW & Monmouthshire CC***:**

- (1), (2), (5) - Agree

- (3) Approximate location of buildings is not acceptable and such vague details will make any future enforcement investigations difficult, the same applies to upper and lower height limits. If outline applications are to be abolished and application should be submitted with full details rather than requiring those critical details via condition.

- (4) The Authority consider that if outline applications are abolished the only other option should be to apply for full planning permission, so all details can be considered, rather than the method being proposed whereby important details will be considered via condition. Furthermore, members of the public may not have the opportunity to comment on the detail which will be submitted as part of a condition, thus making the planning process less transparent to the public. (we see this as a half-way house – either keep it or abolish entirely)

8.5 *Allan Archer:*

- Part (1) I agree for the reasons indicated in the report with the proposed abolishing of applications for outline planning permission.

- Part (2) I agree with this proposal except that I think that the word 'proposed' needs to be removed from the last phrase so that the requirement is clearly applicable to all the types of applications being applied for. Also, if proposal 7.12 is proceeded with then the information requirements for applications need to also take account of the deemed application for a certificate of lawfulness. Consider, for example, an application for an extension to a dwelling – to determine the lawfulness of this proposal would require details not only of the extension but also accurate positioning and dimensions of the original dwelling, other additions and building and boundaries. For existing development, evidence of commencement of use or completion of operations would be required

- Part (3) I think that if applications for outline planning permission are being abolished that this proposal (which in effect replicates the DMPO requirements for outline applications) is somewhat contradictory as it suggests that an application equivalent to an outline application may be submitted (so, in effect, not only no change with the existing position but, worse, extension of this minimum set of requirements as the norm for all applications). I think that the Part (2) proposal should be adequate (information sufficient to describe the proposed development + if 7.12 proceeds sufficient information to determine the lawfulness of the development) supported by Part (4), enabling the applicant to suggest matters that could be reserved for subsequent approval, and Part (5), second bullet point, enabling the planning authority to decline to consider

an application unless further specified details are submitted. Planning authorities would no doubt provide detailed advice on their requirements for various types of development.

- Part (4) I agree with this as it will help to clarify where the applicant is expecting to submit further details or information at a future date and will help Local Planning Authorities (LPAs) establish if an applicant has overlooked any matters that they consider should be dealt with, either during the processing of the application itself or under subsequent conditions.

- Part (5) I agree that LPAs should be able to apply conditions to any permission it grants both on matters suggested by applicant as well as other matters and that the current situation for outline applications whereby they are able to notify applicants that they are unable to determine an application without further specified details being supplied is effectively extended to applications for development whether it is proposed, underway or completed.

8.6 *Glamorgan Gwent Archaeological Trust:* Abolishing outline planning permission: Given amongst other things the introduction and increasing use of formal pre-application discussions we would be supportive of the proposal. The proposal, however, needs to be clear that information classes that can already be required to be submitted to assist determination are still required. We would be concerned if regulation change led to a reduction in pre-determination assessment or evaluation works (see TAN 24 The Historic Environment 4.7-4.10) and the consequent reduction in opportunities for remains to be protected in situ.

8.7 *Carmarthenshire CC:* Agreed in principle however with the following caveats. If outline applications are abolished the only other option should be to apply for full planning permission, so all details can be considered, rather than the method being proposed whereby important details will be considered via condition. There of course will remain a role for conditions in relation to appropriate matters. Providing 'Approximate' locations are not sufficiently specific. Approximate location of buildings is not acceptable and such vague details will make any future enforcement investigations difficult, the same applies to upper and lower height limits. If outline applications are to be abolished an application should be submitted with full details rather than requiring those critical details via condition. Plans need to show existing and proposed developments – not showing accurately existing development can cause issues – especially when these developments are off site.

8.8 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes, agree to all the above except (3) and (4). If outline permission are to be abolished then there should be a clear move to a full permission only. (3) and (4) is a half way position between the two and is inconsistent with principle of abolishing an outline permission. It is felt that (3) could be problematical in terms of enforcement given the reference to approximate locations of all proposed buildings, routes and open spaces.

8.9 *Planning Aid Wales:* PAW agrees that a distinct category of outline permissions is unnecessary and that the focus should be on the extent to which matters are specified or left for later approval. However, public participation and proper engagement must cover the details of a proposed development (i.e. matters likely to be the subject of one or more conditions). We suggest that the extent of consultation on the conditions - and subsequent approval of matters governed by them - must be stated clearly in the new Planning Code.

8.10 *National Trust:*

- Part (1) Agree the proposed abolishing of outline planning permission, given the current onerous information requirements to accompany outline applications.
- Part (2) No comment.
- Part (3) Agree the proposed documentation requirements for applications.
- Part (4) Agree proposed way forward.
- Part (5) Agree.

8.11 *National Grid:* The changes proposed to the manner of making, processing and consenting applications have much to recommend them. Experience suggests that different planning authorities may have different interpretations of the proposed freedoms. This could result in inconsistencies in the operation of the new system. It may be important to monitor how any changes operate in practice, over say a three-year period, to identify inconsistencies. A commitment to publish the results of any monitoring will help to build confidence in reforms and should help with performance too. If there are inconsistencies in how these powers are exercised, they may be most evident in the complex or controversial applications which can be challenging for any planning authority. These can sometimes be the applications bringing new investment and development to an area. Consistency in the way in which applications are accepted, or matters are reserved for the future, will be important for applicants.

8.12 *The Law Society & Huw Williams (Geldards):* We agree with the analysis of the existing law and the view that the day of “red line boundary” applications is long gone. That said, developers may be reluctant to see the disappearance of the outline permission as it still enshrines in the planning system the notion that a “bankable” permission can be secured without designing a scheme in full.

In addition to saving the developer time and money, there may also be legitimate be practical reasons why full details are undesirable. For instance, a large scheme taking many years and consisting of several phases will almost inevitably change as market conditions and tastes change. It is a waste of the scarce resources of planning departments assessing full details too soon and in the knowledge that they will probably be replaced or varied significantly in due course.

While agreeing that there should be a single type of planning application, there should be scope for an applicant to elect to either submit full details or to apply for approval

in stages. The problem with a "staged" approval is the potential scope for disagreement between the applicant and the planning authority. The applicant naturally wants to get a permission with the minimum necessary detail while the planning authority, mindful of the various duties placed upon it, is likely to err on the side of requiring more details. The simplification proposal does not address the possibility of disputes over whether the additional details requested are necessary. Such an impasse could be resolved by extending the straightforward mechanism available in Wales for resolving validation disputes to cover disputes relating to applications for permission in stages and the information necessary to determine such an application.

There may be merit in requiring an applicant seeking a permission "in stages" to have engaged in pre-application discussions with the planning authority and to be able to require a statement on the scope of the details the planning authority thinks are necessary, which could then be subject to the dispute resolution mechanism if the applicant disagreed with the scoping ruling.

Turning to the specific questions in the light of these observations: (1), (2), (3) We agree; (4), (5) and (6) We agree but propose for an "application in stages" a mandatory pre-applications consultation requirement and a dispute mechanism where the applicant and the planning authority disagree on the acceptability and content of an application.

One remaining question that merits further thought is how reserved matters are to be dealt with. It is noted that the question refers at (4) to "conditions reserving for subsequent approval". However, a feature of a reserved matters application is that the grant of reserved matters approval can itself be made subject to conditions. On this basis, the options would appear to be:

- To retain a reserved matter as something distinct from a planning condition, or

- To provide that a condition reserving a matter for subsequent particularisation and approval can itself attach further conditions to the matters approved.

We take the view that all the matters to which a permission is subject, assuming the abolition of outline permission should be termed conditions and that they should be sub-categorised as "conditions precedent" (or pre-commencement conditions), "staged approval conditions" (including but not exclusive to the categories of reserved matters) and "operational conditions" (conditions regulating the building or engineering operations authorised or the operation of the change of use). The powers to regulate the form of planning permission introduced in Wales by section 71ZA would facilitate such an approach.

8.13 *RTPI:*

- Part (1) While we agree to the proposed abolishing of outline planning permission in principle, having one form of application to cover all proposals for development and developments that have already commenced or have been completed seems logical and would help

simplify the current system. However, this is subject to the following comments – we have particular concern regarding the above proposals (3) and (4) for the reasons given below. We believe that further consultation, discussion and consideration of the options is required in relation to this proposal at 8.1

- Part (2) We would suggest the following amendment to the wording of the proposed requirement, "requiring that every application for planning permission for development- whether that development is proposed, or is under way, or has been completed be accompanied by plans, drawings and information sufficient to describe 'the development being applied for' in place of "….'information sufficient to describe the proposed development' as this implies a differentiation between proposed developments and those already underway or completed contrary to the stated aims of this section.

  The word 'proposed' needs to be removed from the last phrase so that the requirement is clearly applicable to all the types of applications proposed.

  We also note that if the proposal set out at question 7.12 is commenced, then the information requirements for applications need to also take account of the deemed application for a Certificate of Lawfulness. For example, an application for an extension to a dwelling, to determine the lawfulness of this proposal would require details not only of the extension but also accurate positioning and dimensions of the original dwelling, other buildings and boundaries. For existing development, evidence of commencement of use or completion of operations would be required.

- Part (3) This appears to replicate the documentation currently required as a minimum to accompany applications for outline planning permission and is no more onerous. Is this somewhat contradictory as it suggests that an application equivalent to an outline application may be submitted? We also raise concern at the use of the word "approximate", which is not acceptable when considering an application or taking enforcement action.

- Part (4) While this may help to clarify where the applicant is expecting to submit further details or information at a future date and will help LPAs establish if an applicant has overlooked any matters that they consider should be dealt with, either during the processing of the application itself or under subsequent conditions. We are concerned that members of the public would not have the opportunity to comment on the detail submitted as part of a condition.

- Part (5) We agree that LPAs should be able to apply conditions to any permission it grants both on matters suggested by applicants as well as other matters and that the current situation for outline applications whereby they are able to notify applicants that they are unable to determine an application without further specified details being supplied

is effectively extended to applications for developments whether it is proposed, underway or completed.

8.14 *Design Commission for Wales:* The Design Commission for Wales would provisionally support the abolition of outline planning permission, on the basis that it does not currently appear to add value to the planning process or valuably serve the public. On the stipulation that a meaningful pre-application advice process is in place, a unified planning application procedure should be more efficient and better equip officers to make well informed decisions on applications for development.

8.15 *Chartered Institute of Architectural Technologists:* We agree that abolishing the outline planning applications could reduce the burden on the administrative teams within the local authorities. It may also allow local authorities to ensure that proposed developments have had the necessary level of scrutiny. However, a balance needs to be considered that outline planning permission for many is an efficient, expedient and cost-effective way of assessing if a proposed development would achieve approval. Whilst acknowledging the fact that it can require minimal supporting information, the application process currently requires the same amount of input as a full application.

8.16 *Douglas Hughes Architects Ltd.:* We were initially surprised by the proposal to abolish outline planning permission. However, in reflection, we see this as a positive outcome. In recent years, the supporting information that we have had to submit as part of an outline planning application has closely resembled that of a full planning application. The only difference between the two is that, more often than not, outline applications are made with all matters reserved apart from Highways. Otherwise, we are still expected to provide illustrative site layouts, along with elevations and floor plans of house types. More often than not, those floor plans already appear on the site plan. With the above in mind, we see the abolition of outline planning as a simplification of the planning process and one that we would support.

8.17 *Friends of the Earth Cymru:* We agree with the proposal to abolish outline planning permission. We consider that applications that are insufficient in information should not cost the authority, but should cost the applicant (for failing to provide the requisite information). We believe that any right of appeal by an applicant should be limited.

8.18 *CMet Residents Group:* One In our particular experience, detailed drawings showing drainage, roadworks and landscaping details were omitted from the Application documents submitted. These details were of particular importance in that, from the Architectural plans supplied, it was clear that the proposed access road encroached onto the edge of the Ancient woodland of Queen Wood. Buried within the considerable text forming the Application, it could be ascertained that the drainage for the proposed Development was routed under the road with the storm drainage outfalling through the woodland to an existing stream.

Detailed Environmental and Ecological assessments were supplied by the Applicant, including an assessment of the number of trees that would have to be removed to facilitate the Development. However, without sight of the detailed drawings mentioned we considered that the assessors could not to reach an accurate and informed conclusion.

A number of very detailed representations were lodged with the Planning Officer pointing out our considerations. Finally, towards the end of a protracted objection period, a limited drainage drawing was forthcoming from the Applicant. The Planning Officer proposed in his Final Report to reserve matters regarding possible damage to the woodland and destruction of trees during the construction period as conditions subject to his subsequent approval.

Our experience demonstrates that representations lodged with the Planning Officer by Community members pointing out important inadequacies in the information supplied must be brought to the Applicant's attention by the Officer in the manner set out in 8.25 above. Further we consider the modified text of 8.25 should form part of the Code. We also note that there is no mention in 8-1 of the action needed if key information supplied by the Applicant in the context of 8-1(2) and (3) is demonstrated to be erroneous or misleading. We therefore would add as point (5):

> (5) an authority would be able in any case to notify the applicant within a reasonable period of receiving an application that it is not able to determine the application without the submission of more details of certain matters, or modifications and corrections to information supplied which is deemed inaccurate or misleading, and additionally if representations received during the stipulated period inform them to this view;

We also propose that the text of 8-1(4) be modified as follows:

> (4) enabling an applicant to invite the planning authority to grant permission subject to conditions reserving for subsequent approval one or more matters not sufficiently particularised in the application, but only when the authority considers that a viable solution exists should the principle of development be acceptable, and providing that the authority does not receive objections to this decision during the stipulated period.

We consider that 8-1(2) and (3) are insufficient and therefore further propose that they be modified as follows:

> (2) requiring that every application for planning permission for development – whether that development is proposed, or is under way, or has been completed – being accompanied by plans, drawings and information sufficient to describe the proposed development and the effect of its presence on the existing environment including existing buildings and dwellings;
>
> (3) enabling the items to accompany applications to be prescribed in regulations, so as to include (so far as relevant) details of
>
> - the approximate location of all proposed buildings, routes and open spaces,
>
> - the upper and lower limit for the height, width and length of each building proposed, and a comparison illustrating the relationship to, and the distance away and height of adjacent existing buildings and dwellings,

- the area or areas where access points will be situated;

Our above comments on 8-1 would therefore result in the text modified in italics [underlined] as follows:

> We provisionally consider that the law as to planning applications could be simplified, by:
>
> (1) abolishing outline planning permission;
>
> (2) requiring that every application for planning permission for development –whether that development is proposed, or is under way, or has been completed – being accompanied by plans, drawings and information sufficient to describe the proposed development and the effect of it's presence on the existing environment including existing buildings and dwellings;
>
> (3) enabling the items to accompany applications to be prescribed in regulations, so as to include (so far as relevant) details of
>
> - the approximate location of all proposed buildings, routes and open spaces,
>
> - the upper and lower limit for the height, width and length of each building proposed, and a comparison illustrating the relationship to, and the distance away and height of adjacent existing buildings and dwellings,
>
> - the area or areas where access points will be situated;
>
> (4) enabling an applicant to invite the planning authority to grant permission subject to conditions reserving for subsequent approval one or more matters not sufficiently particularised in the application, but only when the authority considers that a viable solution exists should the principle of development be acceptable, and providing that the authority does not receive representations objecting to this decision during the stipulated period;
>
> (5) an authority would be able in any case to notify the applicant within a reasonable period of receiving an application that it is not able to determine the application without the submission of more details of certain matters, or modifications to information supplied which is deemed inaccurate or misleading, and additionally if representations received during the stipulated period inform them to this view;

8.19 *Newtown and Llanllwchaiarn Town Council:* Yes. Town council would also like to see inclusion of the Planning (Wales) Act 2015 which brought in significant requirements.

8.20 *Arqiva:* The suggestions recognise the reality that there is now little difference between a full and outline application, with both being a potentially onerous and costly exercise. The situation that has arisen places organisations like ours in a

disadvantageous position. It is clearly in the public interest that developed land which is or potentially redundant is recycled back into an alternative use to provide other forms of development, such as housing for which there may be a pressing need. It is also in the public interest for statutory undertakers and others to be able to maximise returns on the disposal of surplus land so that they can reinvest elsewhere in the service that they provide.

At present it is very onerous to obtain planning permissions, which can act as a disincentive in declaring land redundant. In addition, as developers will naturally seek a heavy discount on price if land does not have the benefit of planning permission or failing that a specific development plan land allocation, the benefits of disposal may not be great. This also acts as a disincentive as well as reducing returns. Under the current system, planning permissions and land allocations are very costly and onerous to obtain, with the development plan system having inherently inflexible and lengthy timescales.

If planning applications are simplified, we suggest that there is a need for a landowner to be able to make a basic application to establish the principle of redevelopment without having to address too many detailed issues. Prescribing matters in regulations could introduce inflexibility and act against that, so any new system should incorporate sufficient flexibility.

8.21 *Natural Resources Wales:* We welcome the proposal to simplify the process for applying for a planning application. We also welcome the proposed requirement that every application should be accompanied by sufficient information to describe the development. However, this should be accompanied with clear guidance that sets out what is 'sufficient information' for the purposes of validating an application.

Proposed provision (3): The degree of acceptable variation should be defined in guidance. Where there is uncertainty of effects, their assessment should be based on a worst-case scenario.

Proposed provision (4) Whilst we welcome the proposal to enable an applicant to invite the planning authority to grant permission subject to conditions, the range of matters where such conditions can be imposed would need to be clearly defined.

We have previously encountered outline planning applications which are not adequately supported by a level of information to allow us to understand the likelihood of significant environmental effects from a scheme. This can lead to delays in the decision-making process because of potential conflicting views on the level of detail required in support of an application. For example, regarding European Protected Species (EPS), we continually face difficulties with insufficient information being provided as part of outline applications.

The proposals for a Planning Code provide an opportunity to address this problem by, ensuring the relevant level of EPS information is provided with a planning application. The submission of this information should not be reserved for future approval. The level of information required by an applicant should be sufficient to enable the local authority to form a view about whether NRW would be likely to determine a licence application for EPS favourably (under the 2017 Habitats Regulations).

Proposed provision: (6) Whilst we support this proposal in principle, we recommend that for its effective implementation the Planning Code should also set out the validation requirements that every planning application is required to meet.

Equivocal responses

8.22 *Mineral Products Association:* proposals for the abolition of outline planning applications need to be handled very carefully. If this is to take place, better integration with the Development Plan process must be considered. Specific site allocations, notably for minerals developments, in a Development Plan routinely require levels of information tantamount to outline applications. Whilst outline applications are not applicable to minerals, this submission of level of detail should effectively establish "an approval in principle" to avoid the need to resubmit information. We note paragraph 8.28 does not support the approval in principle process, however, we feel that the proper and thorough examination of site allocations in the Development Plan should alleviate duplication in the submission of details. This can readily be incorporated in to one planning permission approach referred to in paragraph 8.76, but this would provide an element of surety for the applicant.

8.23 *Bridgend CBC:*

(1) Yes but only for small sites where there is no real merit in obtaining Outline consent. On larger sites where there are likely to be several phases of development over an extended period of time there is no need to seek all of the information up front only an agreed development brief or design code.

(2) Yes

(3) No – this goes against the ethos of frontloading applications and will result in delays in determining applications.

(4) No – it is important that the LPA and statutory consultees/interested third parties have access to the relevant information from the outset.

(5) Yes

8.24 *UK Environmental Law Association:* We agree in principle that the abolition of outline planning permission could have positive benefits in frontloading the planning process. However, we are concerned that the amount of information required in respect of the environment and habitats is not diluted and precautionary (rather than reactionary) principles continue to be observed in the determination of applications.

With regard to minimum requirements we would not want to see the principle of development established on sites which would undermine the biodiversity network. Environmental and habitat impact assessments should not be pushed down the line given the uncertainty of Brexit implications on environmental and habitat law.

We note that in Scotland the arrangements for 'permission in principle' (which are not the same as the new English equivalent) allow simple applications to establish the principle of development in appropriate cases. It would seem sensible in

consolidating the primary legislation in Wales to at least leave that option open, either explicitly in the body of the statute or by providing for the Government to make regulations on the form and content of applications, the reservations of details etc.

Responses disagreeing (without further comment)

8.25 Penstrowed Community Council, Bay of Colwyn Town Council.

Responses disagreeing (with additional comment)

8.26 *PEBA:* On balance, we do not support the proposal to abolish outline planning permission. Outline planning permission is an important investment tool for landowners and developers. Its abolition would run the risk of unintended adverse consequences on development and investment in Wales. Such risks have not been assessed. There is no evidence that the availability of outline planning permission under the current law has resulted in adverse effects or undermined effective development management in Wales. Whilst, therefore, we understand the appeal to simplification, we consider that the current arrangements work satisfactorily and the need to avoid unnecessary concern to developers and their investors should prevail.

8.27 *Caerphilly CBC, POSW South East Wales & Cardiff Council:* No. Although the amount of information required to support an outline application has increased over the years, it is still a distinctly different and well understood process that does not appear to cause developers or LPAs any problems in itself. The description of the alternative at (4) above still retains an applicant being able to invite the planning authority to grant permission subject to conditions reserving for subsequent approval one or more matters not sufficiently particularised in the application, which seems to be an outline application in all but name. Removing the existing clear distinction between outline and full applications, placing all submissions on a spectrum to be agreed between applicant and LPA will make the process less clear and lead to greater opportunity for dispute.

8.28 *Torfaen CBC:* No. The existing process of outline applications and reserved matters applications is a well understood process that does not appear to cause developers or LPAs any problems. The concept of granting planning permission for a proposed development 'in principle', and then approving reserved matters is sound. This 2-stage process involves public consultation and is subject to the democratic process, and as such it is regarded as fair and transparent. If outline and reserved matters applications were abolished in favour of granting one planning permission, then this would result in important details being considered through discharge of condition applications which would exclude the public from commenting. This would arguably be less transparent and undermine the democratic process.

8.29 *Merthyr Tudfil CBC:* Disagree. The proposal is more confusing and far less transparent to the public than the current system. Although the amount of information required to support an outline application has increased over the years, it is still a distinctly different and well understood process that does not appear to cause developers or LPAs any problems. If Outline is abolished only full applications with ALL details submitted at the time of application should be considered – this would not be acceptable or work in practice.

8.30 *Blaenau Gwent CBC:* No. It is not clear why this is seen as simplification/improvement of the system. Outline applications have always been a valued and legitimate means of establishing the acceptability of a proposal. The inherent problem here is that old style outline applications with a bare minimum of information (sometimes only a red line plan) are no longer possible. This has resulted in a convergence of the outline and full applications process to the point where outlines with some details included are often tantamount to some full applications with some details missing.

The solution isn't to abandon the principle of outline applications but to simplify the process to draw clear lines between the two. Whether outstanding details are in fact conditions or reserved matters is perhaps a technical distinction of no interest to anyone other than planners and planning lawyers. Re-labelling reserved matters as "standard conditions" akin to the advert standard conditions might be a way of simplifying matters. It will be for the applicant to submit details up front if so desired (or compelled by the LPA). If approved, an outline permission is simply subject to conditions rather than some conditions and some reserved matters. This would however need to be reflected in the fee schedule so that substantive applications for what are presently RM's would attract more than a simple DoC fee.

8.31 *Ceredigion CC:* Outline applications are a proven, cost effective means of establishing the principle of development, which neither places an undue burden on the applicant, nor on the local planning authority. Need to consider tight controls, appropriate to the scale of development, on time requirements to bring forward the detailed consent, following the grant of outline consent. Worth noting here that there may be different implications for rural areas than for urban areas.

(1), (2) & (5) – Concerns that whilst sufficient information is needed to determine the principle of development in a particular location, these proposals would be unwelcome to various actors:

a) May increase the burden to the applicant of preparing planning application details, prior to establishing the principle of development at a particular location. (i.e. – may be paying for detail, when the answer is no to the in principle decision

b) may reduce the transparency of reserved details to the public (less opportunity to comment on details)

c) may increase the 'in combination workload, with a perception of reduced workload for Development Control,

d) may reduce the planning fee income, with no commensurate reduction in workload.

(3) Approximate location of buildings is not acceptable and such vague details will make any future enforcement investigations difficult, the same applies to upper and lower height limits. If outline applications are to be abolished the application should be submitted with full details rather than requiring those critical details via condition.

(4) Should outline applications be abolished the only other option should be to apply for full planning permission, so all details can be considered, rather than the method

being proposed whereby important details will be considered via condition. Furthermore, members of the public may not have the opportunity to comment on the detail which will be submitted as part of a condition, thus making the planning process less transparent to the public.

The LC solutions are a half way house and provide neither certainty nor clarity.

8.32 *Pembrokeshire CC:* (1) Disagree – Whilst outline applications on allocated sites appear to be of little benefit, an outline application seeking to establish the principle of development on an unallocated site has the benefit of reducing costs for a developer where the acceptability of principle is a matter of contention. Whilst outline applications contain more detail than previously, the majority are far from the detail associated with full applications. If matters of detail (previously reserved matters) are to be dealt with by way of discharge of condition rather than RM submissions, the fee associated with the discharge of condition would not be commensurate with the fee associated with an RM application. Whilst RM applications are not planning applications, they generate public interest and contain the detail that the public make comment on. To relegate these matters to a discharge of conditions application could undermine public confidence in the planning system.

(2) Agree

(3) Approximate location of buildings is not acceptable and such vague details will make any future enforcement investigations difficult, the same applies to upper and lower height limits. This proposal appears to potentially abolish full applications and replace them with 'outline' applications where details would be approved by discharge of condition.

(4) If outline applications are abolished the only other option should be to apply for full planning permission, so all details can be considered, rather than the method being proposed whereby important details will be considered via condition. Furthermore, members of the public may not have the opportunity to comment on the detail which will be submitted as part of a condition, thus making the planning process less transparent to the public. The reference to 'matters' appears to be a reference to reserved matters which, if outline applications are abolished, would have no meaning.

(5) If outlines are to be abolished then this provision would be necessary to ensure that sufficient detail is required.

The LC solutions are a halfway house and don't provide certainty or clarity. Rather than abolishing outline applications they could have the unintended consequence of encouraging less detailed applications where more matters are dealt with by discharge of condition.

8.33 *Newport City Council:* No, what you are actually proposing is the removal of full permission. The previous changes to outline applications have over complicated the process of getting an 'in principle' decision and it would be preferable to return back to the red line on a plan situation. The suggestion would not give certainty.

8.34 *Neath Port Talbot CBC:* It is agreed that the outline planning process was historically an effective way of establishing the principle of development without land-owners/developers incurring significant expense, however that has changed over time and outline consents are now only slightly less complicated than a full application. However the proposal you outline is similar to what is currently in place whereby you are allowing what could be very important details eg siting, scale, design etc to be agreed under a condition of the planning permission. Isn't that what the reserved matters stage is?

It is appreciated that this is similar to that undertaken under the Development Consent Order process however that process relates to major applications where the likelihood of compliance with conditions is greater. Unfortunately with smaller developments, there is a very high tendency for developers to receive their consent and then fail to comply with any or all of their conditions. A piece of research we undertook in 2008 confirmed that this applied to about 50% of permissions. Some were of no consequence but others were of great concern.

If you propose to allow applicants to submit limited details at application stage would it be worth considering retaining an outline application route, but when they submit their reserved matters application, to remove the complexity and confusion of having two decision notices,(if a planning authority is minded to grant planning permission) the outline conditions which remain outstanding are transferred into the Reserved matters decision (which you could even rename to a full permission if it has been submitted pursuant to an outline) and effectively supersedes the outline consent. The developer would then only have one decision notice and one set of conditions to comply with?

If you implement the abolition of outline applications and replace them with less onerous full applications requiring details to be agreed under condition, we are likely to have to start consulting the public on all conditions, which we do not do at present. This will slow down the development process. We also need to consider the fee implications. The fees do not currently cover the cost of delivering the service and this would be exacerbated further if you removed the two stage process and relied instead on complicated matters being dealt with by conditions. If however this was to proceed, the cost of either outline applications or the discharge of conditions would need to rise considerably, otherwise the loss of income would further jeopardise the delivery of the planning service.

8.35 *Accessible Retail:* We oppose this recommendation. The fact that outlines are now expected to be almost as complete as full applications is not a reason to abolish them, but rather one to look at whether the detail currently required is necessary. There is clearly advantage to developers to be able to gain permission in outline before they are committed to the very significant costs of a full application. Correctly used, outline applications can establish the principle of whether or not a particular type of development can be undertaken.

8.36 *CLA:* No, we do not agree with these proposals. Outline planning permissions (OPP) are particularly useful for housing development sites (of all sizes small or large), especially if the owner of the OPP has not yet decided which house builder(s) they

are going to appoint or sell the OPP to. House builders like OPP because they then put their own stamp on development, design etc as part of the reserved matters.

Also, the CLA urges the Law Commission to recommend the swift introduction of the Permission in principle for housing-related development. The PiP has the ability to introduce a cheap and swift application procedure, whilst leaving expenditure for the technical details stage of the process. The use of PiP might be particularly useful for delivering new housing (all size, types and tenures) in villages across the Welsh countryside.

Furthermore, the use of OPP can be useful to testing whether the change of use of an agricultural building to another use (be it commercial, industrial or residential etc) would be acceptable and if so, then reserved matters are can be dealt with at a later stage.

If PiP is introduced in Wales, then it might be possible for OPP to be abolished at that stage.

8.37 *Boyer Planning:* I have concerns with the proposal to abolish outline planning permissions and consider it unnecessary to amend the current system . I am concerned that what is being proposed will not simplify the system but have the opposite effect and make it more complicated.

We undertake a lot of planning promotion work for landowners(as opposed to developers) and as para 8.4 of the Consultation Document recognises they wish to minimise the cost of producing supporting material to establish the principle of development usually by obtaining an outline planning permission with a completed Section 106 agreement which normally provides sufficient comfort for a developer to value and purchase the site with the principle of development established. It would then be for the developer to submit reserved matters which in the case of housing would include house types ,floor plans and elevations of the product the developer wishes to sell .It is true that the days of a red line outline application have long gone but the scale parameters required at the outline stage are not that onerous and it would be a costly and pointless exercise for the landowner to have to submit house type details of a product he is not going to sell. I consider that this system is working adequately well and there is no justification for it to be reformed. It will add confusion if the opportunity to market a site with the benefit of an outline planning permission is taken away.

Para 8.18 of the consultation paper refers to the treatment of reserved matters being unsatisfactory and that PEBA and Persimmon agreed that the planning Code should clarify the definition of reserved matters . However this request for clarification does not justify what is being proposed which is likely to create more uncertainty and lack of clarity. One of the major problems we are faced with at present is the excessive conditions imposed on planning permission and the excessive time it takes to discharge conditions . I have concerns that what is proposed in para 8.25 will lead to local planning authorities imposing more condition than are necessary and extending the power of local panning authorities to request more information to all applications will just lead to more delays in registering applications due to unreasonable requests for information.

In conclusion there is no evidence that the existing system is not working adequately to justify the proposed reform and I am concerned about the potential adverse consequences that would arise. I therefore do not agree with consultation question 8-1.

8.38 *Barratt & David Wilson Homes South Wales:* Consultation Question 8-1 proposes to abolish the outline planning permission process, which we consider provides developers with an indispensable, lower cost option for confirming the acceptability of the basic principle of development, whereby the details of development are reserved for future approval. This proposal would not simplify the process or save money for any parties and it would lead to delays in the process which is contrary to the 'Positive Planning' agenda set by the Welsh Government and its aim to speed up the planning process and we can see no logic in streamlining the process into one procedure.

Furthermore, we have concerns that the abolishment of the outline application process would result in a further culture change within Local Planning Authorities whereby greater levels of information will be requested to support 'full applications with all matters reserved', over and above the levels which are currently required to support outline applications within the existing procedure. In this regard, further guidance on what level of information is required to support an outline application would be welcomed given that Local Planning Authorities are increasingly requesting more onerous information at outline stage which is not always necessary to assess the principle of development but a culture is emerging where Local Authority Planning Officers do not challenge the requests of statutory consultees etc... to confirm that the information is actually required.

This issue is confirmed within paragraph 8.36 of the Consultation Paper, which acknowledges "the tension already noted between the desire of applicants to produce the minimum necessary until the principle of development has been approved and that of planning authorities...to see as much as possible before issuing the approval". The consequences of the proposed changes will be that applicants will be required to commit greater levels of resources prior to confirming the basic principle of development at a site which, in turn, will increase the level of risk associated with the development.

Given that the Welsh Government, via Planning Policy Wales, is seeking to "provide more housing of the right type and offer more choice", we consider that the proposed revisions to the planning application procedure in Wales would, in fact, stymie development by placing undue risk on applicants. As well as impacting upon developers, these changes are likely to have a substantial impact upon individual landowners, whose ability to pursue detailed planning applications is often restricted due to limited resources.

Moreover, the abolishment of the outline planning application process could have a particular impact upon strategic-scale residential sites where flexibility for developers in terms of housetypes and site layouts is imperative and given that many Local Planning Authorities are relying on strategic sites to deliver much needed housing in Wales, the implications of the proposed changes need to be careful considered and appreciated. We consider it overly idealistic to expect Local Planning Authorities to

possess the necessary awareness to determine the appropriate amount of information necessary to determine a strategic-scale development without placing undue restrictions and pressures upon developers. The proposed amendments therefore would serve to complicate the process, rather than simplify it, in this instance.

Accordingly, BDW Homes strongly suggest that the outline planning application process should be retained in its current form and further guidance should be issued confirming the level of information required at outline stage in order to facilitate greater levels of development in line with the Welsh Government's objectives.

The relevant planning application fees must also remain appropriate and commensurate to the scale and detail of the application at hand, and the abolishment of the outline planning application procedure should not result in any financial penalty to applicants due to increased application fees.

In terms of missed opportunities, we would stress that there remains a need to formalise the hybrid planning application process which is currently utilised by the industry (i.e. by seeking outline permission for part of a site and full permission for another under the same red line boundary). It is unclear how this function could be achieved under the current proposals and we would suggest that this is given further consideration.

8.39 *Historic Houses Association:* No, we disagree with the proposal to abolish outline planning permission in its entirety. Outline planning permission should not be abolished with regard to listed buildings, many of which are inherently redundant for the use for which they were first built; for these buildings it is innovative, dynamic and perhaps wholly unconventional uses that might well enable them to secure a long-term future that contributes to their local communities, Welsh heritage and the tourism industry. All reasonable solutions need to be carefully and sympathetically considered, and encouraged as a matter of principle, without the owners of these buildings having to go to the considerable expense of working up the detail of a scheme that may not pass planning as a matter of principle. As far as listed buildings are concerned, the simple expedient of outline consent – which concerns matters of principle at the very earliest stage – should positively encourage innovation and dynamic renewal without a significant cost disincentive at the very start.

An applicant may also be unable to attract investors/sponsors or may even be dissuaded from seeking investment if they are unable to make an approach with outline plans, which allow for a greater degree of variation with a bid than a full application.

The owners of Wales's listed buildings should continue to be given every encouragement to take on projects that would give these buildings a sustainable future, without a massive cost discouragement at the onset.

8.40 *Theatres Trust:* The Trust cautions against abolishing outline planning permission, because this may disincentivise new development by increasing the cost to applicants at the application stage due to the requirement for submission of more detailed proposals and designs early in the process than is currently the case. As a result, applicants may be less inclined to test the principle of new development before

committing to investment. It may also create greater cost at a later stage should proposals require amendment to reflect changing circumstances.

8.41 *Home Builders Federation:* The HBF objects to this proposal for a number of reasons, firstly we do not think that the proposal makes it clear as to whether or not developers will in reality be able to carry on submitting applications with different levels of information and have these applications determined subjected to either reserved matters or conditions as is currently the case. Although identified by the Law Commission as an area where there is arguably duplication there appears to be no evidence that suggests this area of planning is causing specific problems or delays. Such a change would require a real change in behaviour from all sides and as this is so fundamental to the whole planning process there is concern that it will cause a lot of uncertainty and delay. The HBF are also concerned that it will be something that is open to individual interpretation with some LPA's potentially using it to delay the registration of planning applications by asking for more information. It may also result in more planning conditions being attached to consents which would result in further delay in bringing development forward.

However we would also add that if this proposal goes forward we would ask for the wording to make it clear that an applicant has the right to have its application determined as submitted, reserving as many matters as it wishes, as long as it meets the minimum requirements to be registered. Alongside this the LPA could have the right to refuse an application on lack of information as is currently the case a decision against which an applicant can appeal.

HBF also considers that related to this issue is the opportunities to formalise the hybrid planning application process which is currently utilised by the industry (i.e. by seeking outline permission for part of a site and full permission for another under the same red line boundary). It is unclear how this function could be achieved under the current proposals and we would suggest that this is given further consideration.

8.42 *Sirius Planning:* We disagree with the proposal to remove outline planning permission, in favour a of single route to full planning; this will result in higher planning fees for applicants who are unable to fund a full application, and therefore creates a barrier to new sites coming forward. There is a further risk that planning authorities will impose onerous information requirements on applicants - on the basis that the application is for full planning permission - driving up the cost of applying for planning permission.

8.43 *Farmers' Union of Wales:* The FUW are concerned to read in paragraph 8.2 of plans to provisionally abolish outline planning permission. When marketing land for sale, developers think it is useful to obtain provisional consent, subject to conditions, to establish in "outline" the development to which the Local Authority is prepared to approve. This then provides a degree of confidence to the developers, when embarking to purchase a property, but without tying their hands as to a detailed development proposal which can thereafter be submitted for subsequent determination by the Planning Authority.

Outline consent can also assist, to a significant degree, with establishing a valuation for the subject land, which will facilitate a sale from a landowner to a developer. Members felt that to abolish the opportunity to seek Outline Planning Consent would

be counter-productive and a step too far. The information, and accordingly the cost involved in making a full and detailed application is normally much greater than that required for outline planning permission. This in itself may disadvantage a number of landowners and deter or delay the willingness to release land to be developed.

Farmers as landowners sometimes derive an income from the sale of land for development and with income streams from mainstream agriculture being very uncertain during Brexit negotiations, during and after the transition period; all income streams must be protected. On a national scale, any changes which might hinder or exacerbate the building of housing stock should be closely examined.

However paragraphs 8.2 and 8.3 say that the local authorities may "reserve particular matters for subsequent approval" and "the authority is able to serve on the applicant a notice that the application is invalid". This suggests there is an opportunity for the LPA to simply revert back to the application at a later date; is that not simply the same as an outline application just with the name badge removed?

The FUW would appreciate further clarification on the above points.

8.44 *Bar Council:* The Bar Council recognises that it would simplify the system by formally abolishing the 2 stage outline planning permission process whereby an outline permission is followed by the reserved matters stage, however, in practice even full planning permissions are frequently subject lawfully to conditions which address matters of greater detail and which are made subject to a further approval process. That further approval process through condition does not require public consultation and approval whereas a reserved matters stage does require public consultation. The question in the Bar Council's view is whether removing an outline and reserved matters process achieves greater clarity and fairness or not. Central to any need for an outline permission option compared with a detailed permission would appear to the Bar Council to be the nature and indeed size of the development proposal itself.

There would appear to be benefit for the developer of a very large development to have an in principle permission as well as those who may be affected by it. On balance therefore the Bar Council considers that the outline permission option should not be abolished.

8.45 *Arup:* It is understood the Law Commission is proposing to remove outline planning applications (and in effect reserved matters applications) so that they are no longer part of the planning system. The rationale for doing so is that outline planning applications have evolved beyond the scope and purpose for which they were originally intended; to provide a low risk consenting option which establishes the principle of development on the basis of limited scheme detail, providing applicants with the necessary high-level comfort to invest in preparing the information required for subsequent detailed consent or to dispose of the site.

Today, the preparation of an outline planning application places an increased burden on applicants because local planning authorities are leveraging their right to request additional detail in order to make an informed determination on the acceptability of the proposed development. It seems local planning authorities are reluctant to reserve detail (even if all matters are formally reserved for future approval) and the

concept of making a high level determination on the acceptability of a proposed development has been lost.

The most significant issue whilst trying to implement the traditional concept of an outline planning application appears to be the relationship with statutory consultees who will respond on the technical matters at hand without being proportionate and explicit about how their comments relate to the type of application being considered i.e. can their comments be captured by a planning condition. This leads the local planning authority to take a conservative approach and request that the requisite detail is submitted verbatim as per the consultation response prior to determination.

Consistency is a key issue where in our experience one local planning authority may be forthcoming in taking a much less detailed approach when dealing with an outline planning application whereas another local planning authority may take a much stricter approach and leverage their rights to request further information.

Ultimately the question seems to be what matters are appropriate to be reserved by planning condition and what matters should be dealt with during the planning application's determination. In our opinion there should be a mechanism for developers to submit an application that requires lower upfront financial commitment and risk but that still establishes the principle of development to enable an informed decision on future investment. Such a decision should be made on the baseline characteristics of a site established by preliminary surveys (Phase 1 Ecology Survey, Desktop Geotechnical Survey, Transport Assessment etc.) and an assessment of the likelihood of the proposed development coming forward in acceptable manner on this basis.

It should be made clearer in primary legislation that matters of detail can be subject to planning condition and reduce imprecise terminology that enables local planning authorities to take an unreasonably conservative approach to such matters. It should be the applicant's prerogative to reserve these matters in the knowledge that if they produce the necessary information to discharge a planning condition then the parent planning application would not be implementable. In essence, an outline planning application should be modular insofar as whether matters are dealt with in detail at the time or conditioned for later approval.

It is understood that if outline planning applications are removed from the planning system the Law Commission would create an alternative approach where there is only one type of application for planning permission, along with a clear and established principle of reserving detailed matters by planning condition. Ultimately, the aim should be to create a process that ensures developers have the comfort of knowing the principle of developing a site for an intended use is acceptable, and can be established with a relatively low commitment of resources, and also one that isn't open to onerous information requests from local planning authorities and resistance to reserving such matters.

Notwithstanding the possible options for a new type of application, the potential for simply restating what an outline planning application could be should not be discounted. For example, it could just be a case of drawing clear boundaries around the mechanisms of the existing outline planning application process and making clear that in the context of such a process there should be a presumption in favour of

reserving details for subsequent approval either as part of reserved matters or by planning condition.

8.46 *Canal & River Trust:* From an applicant perspective, we consider that the option of outline planning permission should be retained. It is an important option from an applicant perspective, including when dealing with large sites to be developed in phases or in attracting developer interest in a site. It provides planning certainty and a framework in which to develop the detail of proposals at a point when an applicant is ready to prepare them.

8.47 *Chartered Institute for Archaeologists:* Given the need for archaeological assessment and evaluation in appropriate cases before the principle of development is established, we are concerned at any reforms under the guise of simplification which allow and/or facilitate the grant of permission without appropriate consideration of such matters. We appreciate that the abolition of outline planning permission may be said to be beneficial in this regard, but the proposed requirement for all applications to be accompanied by plans, drawings and information sufficient to describe the proposed development should be broadened to make clear that sufficient information is required adequately to assess the impact of development upon, amongst other things, the historic environment.

8.48 *John Almond:* I consider it desirable and necessary to have provision for outline planning permission. An owner wishing to sell a small piece of land needs to know if development would be allowed on the site without having to go through the expense of a full planning application, stipulating exactly what development was proposed. If the land just had a permission for development it would appeal to a wider market and enhance the possibility of a sale.

8.49 *Andrew Ferguson:* The approach to abolish outline PP but have permission with other matters reserved is not supported as it would not be clear to all users what is being proposed. At the current time, members of the public understand the difference between outline permission and full permission. It is not clear what problem this is trying to resolve. Essentially, it would still be outline PP just by another name and may confuse matters further. In addition, given the level of detail required for an application, and the supporting surveys likely to be required, it would appear to make more sense for the LDP to grant "in-principle" consent if this is really seen as an issue. This may have unintended consequences going forward with many LDPs already adopted, but could be considered as part of reviews of LDPs or come into force from the next LDP adopted or a certain date in the future. This would allow LPAs to consider what was being accepted in principle as part of the LDP process –similar to 8.28 (permission in principle). It is also unclear how this would impact on planning fees – would a larger fee be required up front or would there be different fees for the discharge of different types of condition?

Clarification is also required on when the one month time limit (to request additional information) applies from? Receipt of the application or receipt of a valid application (it should be the latter as a determination may be dependent on further detailing) but it is not clear at present in Article 3(2) of the DMP(W)O 2012. For example, no indicative access may be provided at the start, but after the month has elapsed, a

plan showing an access that needs full and detailed consideration may be submitted and yet can't be requested. This relates to point 8.25.

8.50 *Pembrey and Burry Port Town Council:* The Committee felt that it would be better to make revisions to the outline planning procedure rather than abolish it entirely. Their reasoning was that it may prove prohibitive to larger prospective developments if developers had to make a (more expensive) full planning application rather than making an outline application to test opinions of both public and planning authorities.

Responses strongly disagreeing

8.51 *Redrow Homes:* Redrow has strong reservation over the considerations made to creating a single form of planning application. Again, the application procedures and processes set out are UK wide and are not seen by Redrow to be of any problem. There are greater problems with the planning system and changes that improve decision timescales and ability to start developments should be prioritised. As the consultation sets out the reality of making such a change will not change anything in practice. A planning application will be submitted, conditions applied and then these satisfied before development takes place. This being is a comparable manner to which currently exists. Why make this significant change then? From a practical level it is likely to result in significant cost to LPAs in updating their background computer systems at a time when they remain stretched with budgets. Reserved matters are a controlled source of income for LPAs. Any increase of planning fees at the initial application submission adds unnecessary burden to an already risky process. The matter of managing applications for large strategic sites under the proposed single application approach would appear to be challenging, again, for what gain?

8.52 *Central Association of Agricultural Valuers:* We strongly disagree with this proposal. Gaining outline permission, demonstrating an acceptance of development in principle, is an important tool in the land market. It allows owners to market land to developers, as it provides confidence to developers that the land is likely to gain planning and therefore represents a reduced risk. The risk to the landowner of having invested time and money in the process of gaining outline planning permission is rewarded by a sale price that better reflects the future potential of the land.

If outline planning permission were to be abolished it is unlikely that landowners would look to gain full planning permission before sale. The detail, and as such cost, involved in making a full planning application is far greater and therefore would represent a less manageable risk. This would disadvantage a number of landowners and deter or delay release of suitable development land.

Even if a landowner were financially able and willing to take on the risk of gaining full planning permission, a full planning permission would be seen as undesirable by developers. In agreeing reserved matters under the current system, developers have in house specialists engaged in design and budgeting who work together to ensure the site is both economically viable and acceptable in planning terms. A full permission a landowner gained may not be agreeable to a developer, in such a case the sale price could be reduced resulting in a poorer return to the landowner for the financial investment made.

We strongly believe that outline planning permission should be retained for the valuable role it plays in encouraging landowners to release suitable land for development in return for a fair price which recognises its future potential.

8.53 *Huw Evans:* Strongly disagree to any proposed abolishing of outline planning permission. A decision 'in principle' is extremely useful and valuable to small developers. The amount of detail, surveys and assessments currently required often prohibits small schemes of under 10 dwellings being brought forward. This is one of the reasons for the decline of local SME builders where the risk factor discourages applications being submitted. It should not be beyond local planning authorities to be able to assess an application on less information subject to more information being submitted at reserved matters or full application. Small developers need some degree of confidence before commissioning and submitting detailed assessments.

Other comments

8.54 *PINS:* If this proposal is not carried forward, then PINS would like to raise an issue in relation to current practices.

- The former requirements of Design and Access Statements in England were originally referred to as resulting in 'there being no such thing as an outline proposal', but that has now changed back to simply the principal of development. In contrast, basic details are still required by Welsh Legislation through Part 2, paragraph 3 of the DMPO 2012. That Welsh requirement should ensure that a suitable design is at least achievable prior to planning permission being granted and then subsequently confirmed at reserved matters stage.

- However, this requirement/these details are left to 'hang' somewhat and could do with a clearer stated purpose, either within legislation or policy. This is because an outline planning permission with all matters (or perhaps except for access) reserved, would always be subject conditions in relation to reserved matters that could change these details. Nevertheless, the current Welsh approach would appear to be the preferable one where an applicant is required to demonstrate that a suitable design is achievable on a site, even if an equally or more suitable alternative solution is proposed at reserved matters stage. The applicants just need to be aware of this i.e. if it remains.

8.55 *The Law Society:* We note the discussion on Alternative Dispute Resolution (ADR) and particularly the section discussing ADR in the IAG report, which a recent member of our Committee had a hand in drafting.

While not disagreeing with the conclusion that guidance should be issued by WG or PINS, we would comment that the use of ADR in planning would increase if PINS itself were to offer a mediation service funded by an appropriate level of fees to cover the full cost of such a service. There would be a start-up cost of training sufficient inspectors in mediation techniques, but the generally high opinion of PINS decision-making could, in our view, give parties confidence to try ADR.

CONSULTATION QUESTION 8-2.

We provisionally propose that section 327A of the TCPA 1990 – providing that planning authorities must not be entertain applications that do not comply with procedural requirements – should not be restated in the new Bill. Do consultees agree?

Number of responses

8.56 Total: 40 (33 in agreement, 2 equivocal responses, 3 in disagreement and 2 others).

Responses in agreement (without further comment)

8.57 PEBA, Neath Port Talbot CBC, Pembrokeshire CC, PINS, Home Builders Federation, National Trust, Newport City Council, Torfaen CBC, Theatres Trust, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, CLA, Carmarthenshire CC, Monmouth Town Council, Keith Bush, Cardiff Council

Responses in agreement (with additional comment)

8.58 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Rhondda Cynon Taf CBC Monmouthshire CC:* Agreed –although will this get lost in passage of time?

8.59 *Merthyr Tudfil CBC:* Agreed. Although isn't the purpose of the new code to be a 'one stop shop' to be able to reference everything in one place? If so this defeats the purpose!

8.60 *Barratt & David Wilson Homes South Wales:* We agree with the proposal not restate Section 327A of the Town & Country Planning Act 1990 within the new Bill. BDW Homes advocates constructive dialogue between applicants and Local Planning Authorities and therefore we consider the existing clause to be unhelpful.

8.61 *Blaenau Gwent CBC:* Agree provided the power is vested elsewhere.

8.62 *Ceredigion CC:* Agreed that P(W)A 2015 procedure in sections 62ZA – 62ZD in most cases renders the use of section 327A of the TCPA 1990, but note the need for some mechanism to remove an application where information has been requested, but not received. The CC has a high proportion of such applications failing validation and a significant number sit on the books waiting for additional information to be received.

8.63 *Lawyers in Local Government & Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services:* Yes, because it is inconsistent with the approach taken in case law.

8.64 *Mineral Products Association:* the validation of planning applications represents a marked retrograde step in the planning process, adding further and significant delays and costs to the process. A clear definition of what is required in an application should be enshrined in the legislation in order to standardise the approach from authority to authority. This will ensure that the "nice to have" is not confused with the "necessary to make a decision". This can still accord with the procedures referenced in paragraph 8.58.

8.65 *The Law Society & Huw Williams (Geldards):* We agree that this provision has no continuing utility and should, in retrospect, have been repealed by P(W)A 2015 when the validation appeal machinery in ss.62ZA to 62ZD was introduced.

8.66 *RTPI:* While we understand the logic of removing s327A of the TCPA 1990 we would like to draw attention to the recent judgment in *Bishop, R v Westminster City Council* [2017] EWHC 3102 (Admin) which, in paragraph 23 refers to *Main*, *O'Brien* et al which indicates that "finally all counsel agreed that despite the starkly mandatory and identical wording of section 65(5)and section 327A of the 1990 Act ("must not entertain"), nevertheless the court retained a discretion whether or not to quash the second application.

8.67 *Pontarddulais Town Council:* Agree with [8.1] "we provisionally consider that it would be simpler to abolish outline planning permission, and for there to be a single procedure whereby anyone proposing to carry out development that is not permitted by a development order …needs to make a planning application, accompanied by sufficient material to describe the development".

Equivocal responses

8.68 *Bridgend CBC:* Yes – in light of the ability to serve an invalid notice. In practice, LPAs tend to put right errors rather than refuse to deal with an application. However, where it is shown that an applicant has misled the LPA, any consent issued should automatically be made invalid and that any subsequent application should be at the applicant's full cost again.

8.69 *CMet Residents Group:* We agree with the statement in 4.21(2) and would request that the rules [as to making of planning applications] should be included within the new Planning Code. With regard to 4.21(3) we agree that the criteria should be made clear. We fail to understand why a list of required supporting information would not be helpful to all parties particularly members of the neighbouring community affected by the application.

Responses disagreeing

8.70 *Allan Archer:* I do think there is still a case for retaining s327A, although I think some thought should be given as to whether the requirement on the planning authority might be expressed more clearly, i.e. to be clear that questions concerning statements which are false or misleading or recklessly made are entirely matters which are the applicant's responsibility to satisfy.

I think the prospect of unproductive litigation and the possibility that the approach taken in O'Brien may not be upheld in future is not so great as imagined. I am influenced in this view by the recent judgment in *Bishop, R v Westminster City Council* [2017] EWHC 3102 (Admin) which, in para 23 refers to *Main*, *O'Brien* et al and indicates that "finally all counsel agreed that despite the starkly mandatory and identical wording of section 65(5)and section 327A of the 1990 Act ("must not entertain"), nevertheless the court retained a discretion whether or not to quash the second application." Thus, it does not seem to me that the mandatory wording is actually proving really problematic.

s327A is also the precursor to sections 62ZA to ZD insofar as the power to serve notice under s62(2) is dependent via s62ZA(7) on s327A. Consequently, I think s327A should and needs to remain, although I also think, as explained, that the requirement might be clarified as suggested.

8.71 *Welsh St Donat's Community Council:* We do not agree. It is our experience that planning proposals often lack key information that is supposed to be provided in detail in the application but is either totally missing or, more often, mentioned in such limited detail it is unhelpful or misleading. Such a situation either prolongs the period of consideration of the application (requiring multiple requests and responses between multiple parties) or results in poorly informed opinions and, hence, determinations.

We would, therefore, have substantial concerns if there were any watering down of the statement that Planning Authorities should not consider applications that do not comply with procedural requirements. Rather, we would welcome a strengthening and restatement of this issue. Otherwise, we fear there will be an erosion of the robustness and integrity of the planning approval process.

8.72 *Planning Aid Wales:* No, explicit provision for a planning authority to refuse to register an application would underline the need for sufficient information to be supplied so that the planning authority, statutory consultees and third parties can understand what is proposed and its context, and are in a position to comment on the plans. The provision should be phrased in a way that requires sufficient information but not superfluous information or duplication.

Other comments

8.73 *Caersws Community Council:* Councillors feel that there is no need for design and access statements for smaller projects, only large ones. Larger projects should have to provide an executive summary as there are often reams of paperwork to wade through within a short period of time due to the consultation period being only 21 days.

8.74 *Llantwit Major Town Council:* The Consultation Paper also review the process between neighbours/residents and the Planning Officer. The Consultation look at giving residents more opportunity to raise their concerns prior to the Planning Decision being accepted/rejected.

CONSULTATION QUESTION 8-3.

We provisionally propose that section 65(5) of the TCPA 1990 – providing that planning authorities must not entertain applications that are not accompanied by ownership certificates – should not be restated in the new Bill. Do consultees agree?

Number of responses

8.75 Total: 33 (26 in agreement, 2 equivocal responses, 4 in disagreement, and 1 other).

Responses in agreement (without further comment)

8.76 PEBA, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Carmarthenshire CC, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, National Trust, Torfaen CBC, The Law Society, Lawyers in Local Government, Keith Bush, RTPI; Huw Williams (Geldards); Cardiff Council

Responses in agreement (with additional comment)

8.77 *Pembrokeshire Coast NPA, National Parks Wales:* Agreed – more of a legal requirement.

8.78 *Pembrey and Burry Port Town Council:* The Committee was agreed that such a revision was sensible as the provision of sufficient material was essential for planning applications to be considered fully.

8.79 *Allan Archer:* I give my views on [8.2 and 8.3] together. There is a clear case for removing duplication between s65(5) and s327A and, since s327A is referenced in the provisions of s62ZA to 62ZD, I think that s65(5) is the provision which should not be carried forward.

8.80 *POSW, Monmouthshire CC; Neath Port Talbot CBC & Rhondda Cynon Taf CBC:* Agree with removal of requirement to provide ownership certificates, but it should be a specified requirement to provide red and blue lines (ownership) on plan.

8.81 *Cynwyl Elfed Community Council:* the Council supports this. There are means to include this within a consultation prior to planning.

8.82 *Newport City Council:* Yes but provisions need to be added that red and blue lines are compulsory and there is acknowledgement that conditions can be imposed on land outlined in blue. However there could be an issue if the land owner is unaware that an application is made (because they are not a neighbour) and are unable to make representations on a proposal.

Equivocal responses

8.83 *Blaenau Gwent CBC:* I am unclear what the paper is proposing. If it is suggesting that LPA's are able to entertain applications that are not accompanied by any ownership certs, then the consequences of that should be fully explored. Is it being suggested that certificates are optional? Or is it simply stating that what is currently duplication is being removed – if so agreed.

8.84 *CLA:* Applications should continue to be accompanied by a ownership certificate, however it is the criminal penalty that seems to be excessive – after all the planning consent does not affect the ownership, occupation or use of the land, just the potential use that could be made of the land if there is a desire to do so.

Responses disagreeing

8.85 *PINS:* No- if it is important to be able to rely on them being accurate, why do we no longer want to make them mandatory? If there is no compulsion to produce one, and

it's an offence to falsify one, then the incentive is not to bother producing one. PINS also consider an issue of fairness and openness to landowners in relation to this proposal.

8.86 *Ceredigion CC:* Not agreed – this is an important mechanism to ensure that those with an interest in the land have been notified of the application. If retained there should be a means to go 'behind' the certificate eg where a third party suggests the certificate is wrong / misleading or requisite notices not served.

8.87 *Bridgend CBC:* No. Whilst the LPA do not need to know who owns the land (i.e. not a material consideration), the Certificate should be completed and provided as part of the application form because, if it is not submitted with the application, the LPA would not know who owns all or part of the land and a certificate that has not been completed correctly could remove the applicant's right to appeal as the PINS would not entertain an appeal with incorrect ownership details. The applicant would then have to apply again and serve notice on the correct land owners leading to abortive costs/delays. In addition, if we do not know who owns the land and if it is not the applicant themselves, consultation may be prejudiced. The outcome of the proposal would be added pressure on LPAs to carry out their own title queries on all applications.

8.88 *Canal & River Trust:* As a landowner, whose land can be subject to planning applications made by others, we consider that it is imperative that planning authorities should not be able to entertain applications that are not accompanied by ownership certificates. Consequently we would strongly disagree with the removal of Section 65(5). We note the existence of sections 62ZA to 62ZD of the TCPA 1990 but are of the opinion that the requirement for the applicant to provide an ownership certificate is relatively straightforward and shouldn't really be a matter that can be subject to appeal to Welsh Ministers.

Other comments

8.89 *Blaenau Gwent CBC:* Land ownership certificates: these are discussed in the consultation along with agric holdings certs. However, for us they remain a constant source of confusion for applicants. We suggest a change where a simple yes/no question is included on the application form asking if the applicant owns the entire site. "If no, have you notified the landowner(s) in writing" is a suggested approach which is more akin to the advert requirements might overcome what is a continual source of applications being found invalid. Footnotes could deal with advice where owners are not known.

CONSULTATION QUESTION 8-4.

We provisionally propose that the requirements of section 65(2) of the TCPA 1990 and secondary legislation made under that provision as to

(1) the notification of planning applications to agricultural tenants and

(2) the notification of minerals applications

Should be clarified, to ensure that they are only drawn to the attention of applicants in relevant cases.

Do consultees agree?

Number of responses

8.90 Total: 32 (32 in agreement).

Responses in agreement (without further comment)

8.91 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Pembrokeshire CC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, Huw Williams (Geldards), Cardiff Council

Responses in agreement (with additional comment)

8.92 *PINS:* Yes, this seems appropriate. However, PINS question what is meant by 'relevant cases', and clarification is required in relation to this.

8.93 *POSW, Monmouthshire CC, Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, Ceredigion CC & Rhondda Cynon Taf CBC:* Agreed, this has always been an area of confusion the way that it is written.

8.94 *Allan Archer:* I agree with this proposal which should provide greater clarity as to when these particular notifications are required.

8.95 *CLA:* There needs to be clarification that the notification to agricultural tenants applies to both AHA and FBT tenants which is the practical application, but the regulation refers to AHA tenancies.

8.96 *Blaenau Gwent CBC:* If this disposes of the need to submit Agric Holdings certificates on the majority of applications where it is clearly not an issue, then fully support the proposal.

8.97 *National Trust:* We agree that the wording covering the notification of agricultural tenants on existing planning application forms could be clearer and is irrelevant to the majority of applications.

8.98 *Central Association of Agricultural Valuers:* We support the proposal that the requirement in relation to agricultural tenancies should be recast to specifically cover agreements under the Agricultural Holdings Act 1986 and the Agricultural Tenancies Act 1995. We do not foresee any further relevant agricultural legislation so believe this will adequately protect the interests of agricultural tenants.

8.99 *RTPI, Huw Evans:* We agree that the wording covering the notification of agricultural tenants on existing planning application forms could be clearer and is irrelevant to the majority of applications. Consequently the proposed provision that notification of agricultural tenants should only be considered in future where the land is subject to an agricultural tenancy under either the Agricultural Holdings Act 1986 or the

Agricultural Tenancies Act 1995 is a logical and sensible step. No comment in relation to minerals applications.

CONSULTATION QUESTION 8-5.

We provisionally propose that section 70A of the TCPA 1990 (power to decline similar applications) should be restated in the Planning Bill as its stands following amendment by PCPA 2004, the Planning Act 2008 and the P(W)A 2015. Do consultees agree?

Number of responses

8.100 Total: 34 (33 in agreement, and 1 other).

Responses in agreement (without further comment)

8.101 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, National Grid; Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with additional comment)

8.102 *Newport City Council:* Yes but clarification required as to what stage we can decline the application (at validation stage is the preference).

8.103 *Barratt & David Wilson Homes South Wales:* We have no objection to the proposal to provide Local Planning Authorities with the power to decline similar planning applications (where Welsh Ministers have dismissed an appeal against the refusal of a similar application in the last two years and there has been no significant change in the development plan or any other material considerations),

8.104 *RTPI:* We agree to amendments that will update the power LPAs have under s70A of TCPA1990 to decline similar planning applications to include the amendments within PCPA 2004, the Planning Act 2008 and the Planning (Wales) Act 2015 as this will deal appropriately with a current omission.

8.105 *Huw Evans:* The power of LPAs to decline similar planning applications should only be exercised where no detail or information is submitted which addresses matters which led to a refusal of planning permission.

Other comments

8.106 *Llandaff Conservation Area Advisory Group:* The Group wishes to raise a point not covered in the consultation document. It relates to the options available to deal with what we might term “vexatious developers”. We have had an instance of a developer who has not complied with several enforcement notices on a property in one of our

conservation areas. He has been undertaking work on the same unlisted building (a substantial Edwardian house now divided into flats) since September 2014. Whilst eventually he obtained retrospective planning permission for the work, he has since submitted a fresh planning application for substantial changes to that permission, and now a material amendment to what he proposes. We request consideration of a mechanism that can limit the number of times that an applicant can submit applications, or material changes to an application, for the same property.

CONSULTATION QUESTION 8-6.

We provisionally propose that section 70B of the TCPA (designed to discourage or prevent twin-tracking) should not be restated in the Planning Bill. Do consultees agree?

Number of responses

8.107 Total: 39 (38 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

8.108 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Home Builders Federation, Newport City Council, Redrow Homes, Torfaen CBC, Neath Port Talbot CBC, Lawyers in Local Government, Keith Bush, National Grid, Cardiff Council

Responses in agreement (with additional comment)

8.109 *The Law Society & Huw Williams (Geldards):* We agree that section 70B should not be restated. The implementation of section 78A followed consideration of the desirability of allowing the planning authority a period of overlapping jurisdiction. Note that the period of overlap is to be prescribed by development order. However, having regard to planning decision-making cycles it is suggested that the overlap period should be longer than 28 days as there may be situations where the parties do make progress but the planning authority's jurisdiction comes to an end. One possibility is that the applicant and the planning authority can, by agreement, agree to extend the period up to maximum of another 28 days. However, it is not clear if the power to prescribe a period by development order would permit such an approach. A period of up to eight weeks is also a realistic period for parties to engage in and to conclude a mediation.

8.110 *Pembrokeshire Coast NPA, National* Parks *Wales, Carmarthenshire CC:* This suggestion has no real impact on LPA; however, applicants are losing out by the removal of this approach.

8.111 *Allan Archer:* I think it is better to keep options open and agree that s70B should not be carried forward.

8.112 *Accessible Retail:* We support this as no administrative problems result and it offers potential benefits to all parties.

8.113 *POSW, Monmouthshire CC & Rhondda Cynon Taf CBC:* Agreed. It would be unnecessary due to introduction of 4 week window to determine planning applications that are the subject of an appeal against non-determination.

8.114 *Bridgend CBC:* Yes although, even with an appeal against non-determination, LPAs now have 4 weeks to determine an application.

8.115 *Barratt & David Wilson Homes South Wales:* we strongly agree that provision to allow the 'twin-tracking' of applications should be included within the new Bill. We are also supportive of the fee structure reflecting that in reality, due to the similarities in the applications, there is only one application to be determined.

8.116 *Blaenau Gwent CBC:* Agree. Twin tracking is a legitimate option for a developer and it should not be denied. However, disagree with the comment around fees. If the applicant chooses to twin track, the full fee should be payable on both applications.

8.117 *Sirius Planning:* We support the proposal to allow twin-tracking of applications, which will help to speed up the planning process where there are more than one development options. The proposal will also encourage applicants and planning authorities to work together to find agreeable solutions.

8.118 *RTPI, Huw Evans:* We agree as it secures another avenue for mediation and keeps dialogue open, particularly where there are alternative, but similar options, in terms of delivering a development proposal.

8.119 *Pembrey and Burry Port Town Council:* The Committee stated that it agreed that there were a number of practical advantages to allowing twin-tracking to take place.

Equivocal responses

8.120 *Friends of the Earth Cymru:* We agree that repeatedly submitting similar applications must be discouraged (seeking to wear down the local planning authority). We are of the view that 'twin-tracking' applications has the potential to be confusing and onerous in terms of public participation. In determining planning applications it must be clear that the goals of the WFG Act of particular importance.

CONSULTATION QUESTION 8-7.

We provisionally consider that it would be helpful to include in the Bill a provision requiring each planning authority to prepare a statement specifying those within the community whom it will seek to involve in the determination of planning applications. Do consultees agree?

Number of responses

8.121 Total: 55 (17 in agreement, 1 equivocal response, 21 in disagreement, and 16 others).

Responses in agreement (without further comment)

8.122 PEBA, CLA, Glamorgan Gwent Archaeological Trust, Monmouth Town Council, PINS, Newport City Council, Keith Bush, Huw Williams (Geldards)

Responses in agreement (with additional comment)

8.123 *Institution of Civil Engineers Wales:* Yes. It is important that Planning Authorities must achieve the confidence of the public in their decision making and that community consultation should not be seen as merely a box ticking exercise by the public. The simple display of a notice on the site of a development proposal the subject of a planning application containing an invitation to the community to visit the offices of the Planning Authority to view the proposal will not achieve this confidence. Details of the proposal should be made readily available to any interested member of the community likely to be affected by any particular development proposal. Equally the community must be satisfied that any concerns made by it have been duly taken into account by the Planning Authority in reaching its decision and that the receipt of such concerns by the Planning Authority is also not just a box ticking exercise. Provision should be included in legislation to require Planning Authorities to make development proposal information available to the community and to be able to openly demonstrate that submitted concerns from the community have been duly considered.

8.124 *Accessible Retail:* We support this as it will assist developers in engaging in consultation.

8.125 *CMet Residents Group:* An excellent idea provided always that the Authority's statement is subject to Public Consultation prior to publication.

8.126 *Planning Aid Wales:* PAW strongly supports this proposal. We consider that the process leading to preparation of this statement should allow interested people and communities to notify the planning authority of their interest in being consulted on applications in a particular area and/or of a particular type. It would be helpful if this statement was required to be reviewed at regular intervals (e.g. every 5 years).

8.127 *Theatres Trust:* The Trust agrees with this proposal. It has been the case on numerous occasions across England, Scotland and Wales that despite the Trust's status as a statutory consultee, we have not always been consulted on applications related to theatres as per our remit. A requirement for planning authorities to prepare such a statement will hopefully result in greater regard being given to those with whom the authority should consult, and in turn ensure the engagement of the appropriate consultees which will enrich the decision-making process.

8.128 *RTPI, National Trust:* We agree, a statement of community involvement in the determination of planning applications would help to provide certainty over the extent and consistency of neighbour consultation.

8.129 *Sirius Planning:* We agree that preparation of a statement of community involvement by planning authorities would facilitate community involvement in the preparation and determination of development proposals.

8.130 *Allan Archer:* Planning authorities often set out in their planning services webpages their approach and policy with regard to publicity and notification requirements so this provision should not be any significant burden and should ensure greater awareness of each authority's practice. The concept of 'legitimate expectation' is an interesting one, which maybe planners should be more aware of. It was touched on in the *Bishop* judgment mentioned earlier where Westminster Council (as an authority in England) had published a Statement of Community Involvement (although its approach was not expressed in the mandatory terms as in *Majed*). Nevertheless, I think this proposal would be beneficial and I support it.

Equivocal responses

8.131 *Home Builders Federation:* The HBF suggests that it should be made clear that the proposed "community involvement scheme" is not required for every application, if this is the case. It would seem an onerous task if it had to be prepared for each application. The principle of a general statement of policy of how applications of different types will be consulted on is however supported by HBF. Another issue which links to this is that the current requirement for the developer of a major scheme (over 10 houses) to carry out a formal pre application consultation exercise does not include a requirement for the LPA to agree who is being consulted by the developer, in practise this could lead to a different set of people being consulted firstly by the developer and then by the LPA, leading to potential legal challenge.

Responses disagreeing

8.132 *Neath Port Talbot CBC, Rhondda* Cynon *Taf CBC, Pembrokeshire CC, Carmarthenshire CC, Ceredigion CC:* Disagree – the requirements in respect of who to consult in the community are already set out in secondary legislation. Each Planning Authority is also likely to have a policy on consultation which would include issues such as consultation following the submission of amended plans or the rights of audience at planning committee. There should be no need to prescribe this in legislation.

8.133 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* No, because this is already dealt with elsewhere.

8.134 *Bridgend CBC:* No. This is beyond the scope of Article 12 of the DMPWO 2012 (as amended). A Community Involvement Scheme would only be useful in the production of a Development Plan.

8.135 *Caerphilly CBC, POSW South East Wales:* No. The statutory consultation process is set out in the Development Management Procedure Order, which ensures that consultation practices are similar across the whole of Wales. That process has not raised any cause for concern, and there is no merit in supplementing it with an additional statement of consultation.

8.136 *Cardiff Council*: No. The statutory consultation process is set out in the Development Management Procedure Order, which ensures that consultation practices are similar across the whole of Wales. That process has not raised any cause for concern, and there is no merit in supplementing it with an additional statement of consultation. Do

not agree for the reason stated above, also is there an opportunity to state the minimum consultation that the LPA has to undertake.

8.137 *POSW, Monmouthshire CC, Pembrokeshire Coast NPA, National Parks Wales:* Disagree – the requirements in respect of who to consult in the community are already set out in secondary legislation. See little benefit in this, most LPAs have facility to search applications online where the community can comment on applications. However there was a number of authorities which agreed with the requirement to provide a statement of consultation, and some have already adopted a consultation policy.

8.138 *Merthyr Tudfil CBC:* Disagree. Another unnecessary burden on already dwindling resources. The existing approach should remain.

8.139 *Blaenau Gwent CBC:* No. It is unclear what benefit would derive beyond current practice of mandatory and discretionary publicity. Of far more importance is the need to modernise the requirements around publicity of applications. The insistence of WG to place statutory notices in the local press is a practise of yesteryear. Notices are highly unlikely to be read by interested persons yet place time and financial constraint on LPA's. The use of web sites and social media is far more effective when used with traditional letters and site notices. Updated regulations together with guidance on this matter would be far more beneficial than the suggestion in the paper.

8.140 *Torfaen CBC:* No. If LPA's had to produce their own list of consultees then this would introduce inconsistencies and uncertainty for developers. It is better to ensure that consultation practices are similar across the whole of Wales.

8.141 *Mineral Products Association:* Again, we must disagree with the proposals in Question 8-7. Such a requirement, specifying the details of any pre-application community consultation should be specified in legislation to ensure consistency across authorities. Simply requiring an authority to produce such a document will facilitate the further fragmentation of the planning process.

8.142 *Andrew Ferguson:* I don't agree that there should be a statement specifying those within a community who it will seek to involve in the determination of the application – I am not sure how this is that helpful. It would appear to be just another bureaucratic task. How much value does this add to the process? Requirements to consult are set out in DMPO and this is (should be) complied with. This will result in more work to start with (when Authorities are already struggling with resources) and will create more work in the future when it is argued that something is not complied with in an agreed statement. The requirements are set out in legislation – some additional interpretation may help in this regard but

8.143 *Redrow Homes:* Redrow does not feel that each LPA should be given the ability to prepare a statement specifying those within the community whom it will seek to involve in the determination of planning applications. The list of statutory and non-statutory consultees is set out and extensive. The requirements should be set at a National level and not for LPAs to decide. Redrow does not see this matter as being an issue/problem and so why this is being suggested.

Other comments – advertisement in the local press

8.144 *POSW, North Wales Development Managers' Group, Monmouthshire County Council:* Delete the need for advertising of applications in the press. This is an expensive and limited method of advertising and there are alternatives solutions which can reach wider audiences more effectively. With regard to the resource issue, now would be the time to ensure that the legislation moves with the times and allows Planning Authorities to advertise applications in new innovative ways and do away with the requirement for newspaper advertisements. This would substantially reduce costs to many authorities. One Authority quotes an advertising budget in excess of £50k with each single advert costing approximately £300. The Planning Portal could be an opportunity to be a more efficient way of advertising.

8.145 *Merthyr Tudfil CBC:* Consideration should be given to including the following: Delete the need for advertising of applications in the press. This is an expensive and limited method of advertising and there are alternatives such as Council websites and/or the Planning Portal which can reach wider audiences more effectively. Legislation should move with the times and do away with the requirement for newspaper advertisements. This would substantially reduce costs to many authorities.

8.146 *Blaenau Gwent CBC:* Recommend a review of publicity for planning applications: press adverts for apps and LBC issues is a significant draw on limited reserves for little or no benefit to the public who are the intended recipient of the information. Bilingual requirements result in the cost impact being worse than that in England.

8.147 *Pembrokeshire County Council:* With regard to the resource issue, now would be the time to ensure that the legislation moves with the times and allows Planning Authorities to advertise applications in new innovative ways and do away with the requirement for newspaper advertisements. This would substantially reduce costs to many authorities.

8.148 *Neath Port Talbot CBC:* Remove the need to advertise applications in the press. This is an expensive and limited way of advertising and there are alternative solutions which can reach wider audiences more effectively. The circulation figures for Neath Port Talbot are 20,031 whereas the social media circulation figures for NPTs corporate pages alone are

Twitter (English account) 11,561 followers

Twitter (Welsh) 145 followers

Facebook (English) 5904 likes

Facebook (Welsh) 22 likes

LinkedIn 2,212 followers

8.149 These figures only relate to the corporate council accounts and do not include the other multiple accounts held by different services within the council. If social media consultation pages were set up for each authority then there is a potential that we will reach more people at a significantly reduced cost.

8.150 *Andrew Ferguson:* It is considered that neighbour notification in the press should be abolished as it is outdated and there are more appropriate, responsive and cheaper ways to advertise that would reach a wider audience. For example, in Swansea we have 13.9 million page views a per year on Swansea.gov.uk; The number of followers we have on twitter is 44,450 and rising; The number of Facebook followers is 12,121 and rising. The local paper that we advertise in has a circulation of approximately 21,000 people and is an English only paper in any event.

8.151 *Caersws Community Council:* The consultation period available for comments to be put forward is only 21 days. For Caersws Community Council this often poses a problem as meetings are held monthly so applications often come through at a point in the month where the Council misses the deadline for commenting unless they arrange another separate meeting just to discuss a planning application. It would be helpful to all those wishing to offer any kind of views for the time scale to be 30 days as a minimum.

8.152 *CMet Residents Group:* In response to 4.21(5): Our local Council Planning Officer stipulated a 14-day period for objections to be made. This might be appropriate to a single house extension but most members of our Community with families and busy working lives considered this period to be too short for proper consideration and a full response to a major complex scheme. We feel that the return period for objections should be varied and increased in line with the size and complexity of the proposed development and your remit should be extended to include this point in the new Code. We realize that this might extend the planning process but consider that the rights of the individual are paramount and more important than a delay to the planning process.

8.153 *Michael Kiely:* Scrap the need to place application publicity adverts in the local press – council websites and site notices are more than enough. The measure will save a fortune. In London we worked out that compulsory press adverts cost us £1.6M per annum (2006/7 survey) which is about £48K per LPA – that's the cost of a senior planner in every London Borough!

Other comments – Role of town and community councils

8.154 *Newtown and Llanllwchaiarn Town Council:* Role of town and community councils: this appears to receive scant if zero consideration. Local councils already have a role as statutory consultees in processes for planning applications, pre-application consultations, and local development plans. The Welsh government is also encouraging local councils to develop 'place plans' to provide a long-term planning and planned future for communities, which will sit alongside local development plan and may be adopted as supplementary planning guidance. The Welsh Government is also reviewing the role of local councils with a view to strengthen it – with new construct and new enhanced functions. The town council is of the view that these should be acknowledged in the commission's prosals for planning law in Wales.

8.155 *Llantwit Major Town CouncIi:* Llantwit Major Town Council would like to see the Paper review the Town and Community Councils roles within the Planning Process. The Consultation Paper look into firming up the consultation process between Town/Community Councils and Borough Councils. Town and Community Councils be given a fairer representation in the Planning Process.

8.156 *Holywell Town Council:* Town Councils be given more powers and have greater weight of input into the planning process.

8.157 *Pontypridd Town Council:* Although the Members would welcome the expansion of their role as a statutory consultee, it is to be hoped that this role could be properly expanded in a meaningful way and the views of Town and Community councils given proper and appropriate weight, particularly in respect of proposed developments within their communities and the local knowledge which can be brought to such matters. It is strongly felt that the needs and wishes of the local communities are not currently being taken into account in Planning matters and that Town and Community Councils are best placed to recognise and voice the “grass roots” views and needs of their local communities in respect of planning proposals and developments. This would allow for greater community “ownership” of local facilities and projects. We would say that Town and Community Councils, such as Pontypridd Town Council, are best placed to understand the local consequences of a Planning Application and to gather and express local views. At present our influence is marginal, we would hope to move towards having a far greater degree of influence on planning decisions, particularly on more local issues, and for there to be Town Council representative for example who could address a Planning Committee where necessary and appropriate.

8.158 *Carreghofa Community Council:* I think it is important to simplify the process to help the layman understand the "ins and outs". Although it will still be a complex piece of legislation, I feel it would be beneficial (imperative) for Powys CC representatives to "educate" the Community Councils when it is completed. I would suggest that rather than the CC representatives go to Llandrindod (for example, as I did some 12-18 moths ago), Powys should hold roadshows/presentations where 4 or 5 'close' CCs could attend such as Carreghofa, Four Crosses, Aardleen and anyone else nearby.

Other comments – Role of police

8.159 *South Wales Police:* In this respect we would support a provision that applicants for planning consent would carry out a Community Safety Audit/Impact Assessment which would recognise and assess the impact on crime, disorder and anti-social behaviour of any proposed applications/plans so that suitable provision is made for the same. As any proposed development can place extra pressure on the social, physical and economic infrastructure which already exists in a certain area and can present new evolving policing challenges – we would wish to be fully consulted and have the opportunity to ensure that such impacts and any measures required are reflected in any planning conditions imposed. In this respect we would wish to be consulted in a timely manner and due consideration given to any submissions. In conclusion, we would ask that our rights to be consulted on any development/planning issues and to engage in order to minimise any impact upon the policing and safety of an area are not in any way adversely impacted by any proposed changes to the planning legislation.

CONSULTATION QUESTION 8-8.

We provisionally propose that the DMP(W)O 2012 should be amended to make it clear that representations as to a planning application received after the end of the 21-day consultation but before the date of the decision should be taken into account if possible, but that there should be no requirement to delay the consideration of the application. Do consultees agree?

Number of responses

8.160 Total: 31 (19 in agreement, 8 equivocal responses, and 14 in disagreement).

Responses in agreement (without further comment)

8.161 PEBA, Institution of Civil Engineers Wales, CMet Residents Group, Monmouth Town Council, Home Builders Federation, Newport City Council, The Law Society, Keith Bush; Huw Williams (Geldards)

Responses in agreement (with additional comment)

8.162 *PINS:* Yes - but are there any implications for the normally strict timetables at the appeal stage? Will some make the argument that as things are accepted after the deadline at the application stage, that they should be accepted at appeal stage too?

8.163 *Bridgend CBC:* Yes - a cut off period (say 28 days) would be useful as the LPA operate a scheme of referring applications to DC Committee if it is the subject of three or more objections.

8.164 *Torfaen CBC:* This reflects the practice of TCBC. Embodying it in law could help provide consistency, and provide reassurance to applicants that their applications will definitely be considered at a scheduled Planning Committee, and that any late correspondence will not necessarily result in a decision being delayed.

8.165 *Allan Archer:* I agree with this proposal which reflects current practice but wonder if there needs to be some clear end point for practical reasons. This relates to the effect of having to accept 'late' submissions on the decision making process – ensuring that those making the decision have sufficient time to read and consider the 'late' representations before making the decision. Would this lead to applications having to be deferred if a large quantity of 'late' submissions, or very complex or technical submissions, are received (or perhaps tactically submitted), just prior to the start of a committee meeting. I think that the wording of the proposed provision in the DMP(W)O needs to be carefully thought through.

8.166 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes. It is agreed that revision could be made in DMP(W) O 2012 for clarity and does not need to be referred to in the Planning Bill.

8.167 *Theatres Trust:* The Trust agrees with this proposal. In light of the potential for the details of applications to be amended and/or additional information to be submitted prior to determination, it is right and fair that additional or amended consultee comments may also be submitted beyond the end of the 21-day consultation period.

8.168 *National Trust:* Agree, this formalises current practice (but potentially not widely appreciated by consultees and Members of the Public) that any representations received prior to the determination of an application are taken into account and not just those received during the statutory 21 day consultation period.

8.169 *Central Association of Agricultural Valuers:* We agree that there may be circumstances in which it is appropriate to consider evidence submitted after the 21 day consultation but think that late evidence should only be accepted in exceptional circumstances. The 21 day deadline should remain the generally accepted and adhered to deadline in order that the determination is less likely to be delayed which could add expense and inconvenience to the landowner.

8.170 *Sirius Planning:* We fully support the provision that decisions should not be delayed to wait for consultation responses, including statutory consultees, to arrive.

Equivocal responses

8.171 *Caerphilly CBC, POSW South East Wales & Cardiff Council:* This reflects the practice of most LPAs, but would embodying it in law result in its misuse, with those wishing to prevent development deliberately withholding the submission of any comments until the latest date when they know they can be submitted?

8.172 *Blaenau Gwent CBC:* Partially agree. There should be the flexibility for LPA's to disregard late correspondence submitted before Planning Committee. It was becoming a tactic for objectors to deliberately submit late correspondence as this is often read out at the meeting and therefore assumes greater significance than earlier correspondence that is paraphrased in the body of a lengthy report. As a result, we have a cut off of 48 hours preceding Committee. Correspondence received after that deadline is disregarded. Correspondence received after the report has been filed and printed (but before the 48hr deadline) is reproduced on a late correspondence sheet handed out at committee and not specifically referred to.

8.173 *Glamorgan Gwent Archaeological Trust:* Amendment to DMP(W)0 2012: Whilst we would agree with the proposal to clarify the status of late representations, the counter-balance of there being no delay to deferral because of such a submission might increase the risk of legal challenge to the determination.

8.174 *Barratt & David Wilson Homes South Wales:* We have no objection to late representations being considered by Local Planning Authorities prior to the determination of a planning application where possible, although we strongly agree that there should be no requirement to delay the consideration of the application.

8.175 *Redrow Homes:* Redrow does not believe that the suggested amendment changes anything that happens in practice. The issue with representations is that they can be considered up until determination. Late representations post a Planning Committee agenda being published up until the day of Committee can often result in deferment. Having an 'end date' when representations can be considered until would be beneficial. However, careful consideration would be needed to reinforce the importance for all stakeholders responding with set timescales and not seeing the 'end date' as the point they can comment up to and gain further time.

8.176 *Natural Resources Wales:* We welcome measures that will support timely and informed decision-making. However, there are occasions where inadequate information has been provided in support of a planning application. The provision of additional information can incur delays to the decision-making process, especially if the request for additional information is contested by the applicant, or is delayed for other reasons. We would have concerns if the above proposed measure leads to a situation whereby planning permission is granted without the necessary information or evidence required to make an informed decision.

Responses disagreeing (without further comment)

8.177 Merthyr Tudfil CBC

Responses disagreeing (with additional comment)

8.178 *RTPI:* Practice evidence from Northern Ireland where this is already detailed in legislation, causes us concern and we do not support such a proposal. In many occasions comments are received after the 21 days and frequently just the day before Committee. They are required to be taken into account but officers have not been able to give them the due attention to be able to effectively inform the recommendation or decision.

8.179 *Pembrokeshire Coast NPA, National Parks Wales, Ceredigion CC, Pembrokeshire CC:* Disagree. Doesn't this merely formalize the impossible? – 21 days and if we can we will, but not prepared to make it formal statement as then we get lots of complaints about timing etc and not on the substance of the application. It merely extends complaints. This should remain as a best practice approach rather than forming part of any legislation.

8.180 *POSW, Monmouthshire CC:* Disagree. This should remain as a best practice approach rather than forming part of any legislation. However there was a number of authorities which agreed with the proposal to allow for the submission of representations after 21 days (in accordance with suggested wording) as in effect unlikely to be received within 21 days to allow for early determination.

8.181 *Neath Port Talbot CBC:* Disagree. This could be abused. We frequently get calls from Cllrs to delay processing an application as one of the constituents near a site is on holidays or they are on holidays and therefore unable to respond in time to a consultation and/or attend planning committee. This is unacceptable and will delay the decision making process.

8.182 *Carmarthenshire CC & Rhondda Cynon Taf CBC:* Disagree. This should remain as a best practice approach rather than forming part of any legislation.

8.183 *CLA:* No. The proposals are unacceptable. CLA members, who are applying for potentially beneficial rural economic development, constantly complain that statutory consultees often do not respond within the statutory public consultation period of 21 days. If the DMP(W)O 2012 is amended to allow additional leeway then it is almost certain the planning officer will be delayed in producing their report which will delay the decision.

8.184 *Mineral Products Association:* No, we must disagree with this approach. If the legislation requires consultation responses to be submitted within 21 days, this period should be adhered to. Allowing consultation responses to be considered right up until the date of determination is a tactic used of delay the determination process. By all means consider a 28-day consultation process, but there must be a cut-off, after which time the authority does not need to consider the representation, including representations from statutory consultees.

8.185 *Canal & River Trust:* It is unclear if this proposal relates to representations in general (DMP(W)O 2012, article 21) or also includes those of statutory consultees (DMP(W)O, article 14). Whilst we do not believe that there is any need to delay consideration of the application on the expiry of the 21 day period (or agreed extension for statutory consultees) we consider that the wording "if possible" is not precise enough. What in practice does this mean for the decision maker, will it lead to an increase in legal challenge? It is our view that this proposal will lead to greater uncertainty and consider that it would be more appropriate to give clarity to the existing position and practice where all representations are taken into account prior to determination.

CONSULTATION QUESTION 8-9.

We provisionally consider that the distinction between conditions and limitations attached to planning permissions should be minimised, either:

1) **by defining the term "condition" so as to include "limitation", or**

2) **by making it clear that planning permission granted in response to an application or an appeal (as opposed to merely permission granted by a development order, as at present) may be granted subject to limitations or conditions.**

Do consultees agree?

Number of responses

8.186 Total: 38 (36 in agreement, 1 equivocal response, and 1 other).

Responses in agreement (without further comment)

8.187 CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Monmouth Town Council, Pembrokeshire CC, Chartered Institute for Archaeologists, National Trust, Newport City Council, Keith Bush, Mineral Products Association, Neath Port Talbot CBC, Bridgend CBC, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Natural Resources Wales; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

8.188 *PINS, Planning Aid Wales, Torfaen CBC:* Yes. Option 1 would be preferred.

8.189 *Allan Archer:* I agree that there needs to be clarification. The simplest solution, it seems to me, would be to include a limitation within the scope of a condition [Option 1].

8.190 *The Law Society & Huw Williams (Geldards):* We agree that the distinction is unhelpful and would support a definition of "condition" that states that it includes any limitations of the effect of the permission.

8.191 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes. It is felt that (2) would be the preferred option because a limitation is different from a condition.

8.192 *PEBA:* Yes. The alternative would be to define limitation so it is clear that it applies only to consents granted by development order, so as finally to resolve the continuing lack of clarity as to whether a "limitation" may be imposed on an ordinary planning permission. See *I'm Your Man Limited v Secretary of State* for *the Environment [1999] 4 PLR 107.*

8.193 *Andrew Ferguson:* Support the proposal to do away with the distinction between conditions and limitations as it is not clear in practice what the distinction is.

8.194 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes. Most practitioners use, and understand, any requirement imposed upon a consent to be a condition, whether it requests the submission and agreement of additional information, limits the site area or scale of the development, or imposes an ongoing limitation such as hours of operation.

8.195 *Theatres Trust:* The Trust agrees that the distinction between conditions and limitations attached to planning permission should be minimised, but we suggest that the distinction could also be made clearer by moving some conditions/limitations into formal application types. For example, the scenario outlined in paragraph 8.87 could be managed by introducing time-limited (temporary) permissions as a formal application type, thereby making the consent an outcome rather than a limitation or condition that needs to be outlined.

8.196 *Redrow Homes:* Redrow believes that a singular term of "condition" should only be used.

Equivocal responses

8.197 *RTPI:* The explanatory text and proposal are confusing. Further clarification is required before we are able to respond.

Other comments

8.198 *Andrew Ferguson:* Conditions – the only query is in regard to the fee to discharge conditions which relates to comments in 8.2 (i.e. would there be a standard fee and if so, how does this relate to what would normally be considered Reserved Matters under the current system)?

CONSULTATION QUESTION 8-10.

We provisionally propose that the provisions in the TCPA 1990 as to the imposition of conditions should be replaced in the Bill with a general power for planning authorities to impose such conditions or limitations as they see fit, provide that they are:

(1) **necessary to make the development acceptable in planning terms;**

(2) **relevant to the development and to planning considerations generally;**

(3) **sufficiently precise to make it capable of being complied with and enforced; and**

(4) **reasonable in all other respects.**

Do consultees agree?

Number of responses

8.199 Total: 46 (42 in agreement, and 4 others).

Responses in agreement (without further comment)

8.200 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Pembrey and Burry Port Town Council, Pembrokeshire CC, Chartered Institute for Archaeologists, National Trust, Newport City Council, Torfaen CBC, Sirius Planning, Mineral Products Association, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Canal & River Trust, Lawyers in Local Government, Keith Bush, National Grid; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

8.201 *RTPI:* We agree that the Bill should, when giving the planning authorities the general power to impose conditions or limitations, also detail the 4 specified criteria that such conditions/limitations must adhere to. We raise some concern regarding the use of the wording “as they see fit” as this is unclear and could be mis-understood.

8.202 *Allan Archer:* I agree that the phrase ‘subject to such conditions as they think fit’ is not properly understood – it being suggested to me in the past that it meant ‘whatever they (the Committee) liked”. Consequently, I am in favour of the more detailed provision proposed reflecting the well-established tests (although I would prefer to see the phrase ‘as they see fit’ to be replaced by something less able to be misinterpreted as I have indicated above).

8.203 *Barratt & David Wilson Homes South Wales:* Whilst we have no objection to the tests of validity being included in the Planning Code, this should be supported by technical reform in-relation to how LPAs draft, agree and discharge conditions.

8.204 *Planning Aid Wales:* PAW agrees, subject to the concerns regarding consultation on conditions.

8.205 *Theatres Trust:* The Trust agrees with this proposal, which would give the flexibility to decision makers to implement conditions that respond to particular or local conditions. In the case of theatres and other such cultural facilities, conditions have for example been implemented to ensure that development of replacement facilities has been completed before operations at the existing facility have ceased.

8.206 *PINS:* Yes, however, clarification is needed on the phrase 'sufficiently precise'. It is not clear if this is to be precise, or not?

8.207 *Home Builders Federation:* Although the HBF supports this proposal in principle we are concerned at the use of the phrase 'planning considerations generally' and are not sure what clarity this adds to the tests.

8.208 *Redrow Homes:* Redrow comments on whether it is appropriate to add specifically a reference not to duplicate controls of other legislation (e.g. building regulations, highway agreements etc) and also making it a requirement that the information required by a condition is to be requested at the appropriate time (i.e. whether it is clearly required pre-commencement, pre-building works, pre-occupation etc).

8.209 *Natural Resources Wales:* We welcome the clarity that this proposal brings.

8.210 *Caerphilly CBC, POSW South East Wales & Cardiff Council*: Yes, but the opportunity should be taken to clarify the role of mitigation and enhancement with regard to biodiversity. Welsh statute and policy (notably the Environment Act and the WFG Act) and TAN5, promote enhancement and mitigation, promote building ecosystem resilience and embedding biodiversity throughout decision making at all levels, not just the maintenance of the status quo. Planning has traditionally sought to achieve appropriate and relevant improvements via new development (for example new cycle path provision), but biodiversity enhancement (often as set out in a developer's ecological report) has in some recent cases been deemed 'unnecessary' by The Planning Inspectorate but not in all cases. We, and I understand a number of other LPAs, have experience of wildlife habitat enhancement conditions being struck out at appeal because they do not pass the tests for conditions.

Section 6 of the 2016 Environment Act states: "A public authority must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions." Doesn't that duty make enhancement conditions necessary, relevant to planning, relevant to the development and reasonable, provided they are not onerous, and are enforceable and precise? How does that duty, and similar ones found in the Crime and Disorder Act, the Wellbeing Act, and any other act, compare to the ones in the Listed Building Act such as the need to consider the impact of any development on the setting of an LB when we determine a planning application? We and The Inspectorate accept that last duty and include it in our reports, and may even impose conditions as a result. The LB Act is explicit in that it refers to granting planning permission, whereas the other acts tends to place duties on the Council as a whole, but what effectively is the difference?

This has been discussed at an all Wales level by Local Authority ecologists, and a meeting has been held with Welsh Government. Where mitigation and enhancement is relevant to the development and to planning considerations generally, it should be acceptable to impose the appropriate biodiversity enhancement conditions.

Other comments

8.211 *Friends of the Earth Cymru:* We are of the view that conditions are essential to the public interest purposes of the planning system.

8.212 *Arup:* Planning conditions are a key component of outline planning applications as discussed earlier but are also relevant components of the wider planning system, including in relation to detailed planning applications and reserved matters applications amongst other consenting regimes. There are a number of scenarios where the procedures and application of planning conditions can be improved in order to benefit the operation of the current planning system to the benefit of stakeholders.

Fundamentally, local planning authorities should consider whether otherwise unacceptable developments could be made acceptable through the use of conditions but planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects.

Local planning authorities across Wales are moving away from imposing precommencement conditions to detailed planning decisions and are instead seeking to agree conditions earlier in the application process to speed up decision making and the commencement of development.

We therefore agree that Wales should adopt a similar approach to that being adopted in England where conditions that are required to be discharged before development commences should be avoided, unless there is clear justification to do so. However, we believe that this requirement should be incorporated into the Planning Bill and supported by policy and guidance, adopting a similar approach to Sections 100ZA(4-6) of the Town and Country Planning Act 1990 and the revised draft National Planning Policy Framework.

This statute and policy should place a duty on local planning authorities to share with the applicant any draft pre-commencement conditions and provide them with the opportunity to submit the information that would be required under the pre-commencement condition upfront. Meaning that only if an applicant confirms their agreement to a precommencement condition in writing, should that pre-commencement condition be imposed. In relation to outline planning applications, pre-commencement conditions provide a mechanism for deferring the determination of certain matters to reduce the upfront burden on the developer and help speed up the process of determining the application.

The main issues relate to the lack of clarity from statutory consultees when providing consultation responses and how (or if) their comments can be translated into a planning condition.

Leading on from this, not all local planning authorities seem to have the resources required to provide detailed analysis of the consultation responses received during the application process and distil these into a set of draft planning conditions for the applicant's review and agreement. Subsequently, this culminates in an issue where consultation responses are being translated into planning conditions and attached to decision notices without the proper scrutiny or engagement with the applicant.

Once attached to the decision notice the applicant has no reasonable option to amend planning conditions that they feel are onerous or that might be considered to fail one of the six tests. It is not considered that the existing appeals process is an appropriate mechanism for addressing the issue of inappropriate conditions due to its time and cost implications, similarly Section 73 applications are not a mechanism commensurate with addressing the imposition of fundamentally inappropriate conditions.

The solution is to ensure that there is provision within legislation that compels both statutory undertakers and local planning authorities to consult with applicants on the form and detail of planning conditions prior to decisions being made. In this context, there could be flexibility around this requirement so that the major planning applications receive the most robust provisions.

In aiding the imposition of planning conditions, it is considered that existing legislation needs to be reformed and guidance needs to be more explicit so that there is a presumption in favour of being able to agree what to reserve by planning condition. This in effect would help reduce delays to applications where applicants do not want pre-commencement conditions but also prevent onerous information requests being made of the applicant in some circumstances (such as outline applications) but still ensure all matters are dealt with prior to commencement of development.

In the interests of helping local planning authorities make more timely decisions, the 21day consultation period of a planning application should be more strictly enforced, especially in the context of the pre-application consultation regulations brought into effect by the DMPWO amendment in 2016 which gives statutory consultees two opportunities to comment on major planning applications.

In effect, we propose that if statutory consultees are not forthcoming with comments within the 21-day consultation period then the comments received during the pre-application consultation process remain binding. If no comments are received within the specified time periods across both processes, then a response of no objection should be presumed.

Of note we are currently undertaking an improvement project with Natural Resources Wales (NRW) drafting a set of model conditions for their planning remit. These conditions once adopted will be used for all their consultation responses both during the preapplication and determination stages of a planning application and should remove the lack of clarity that local planning authorities sometimes experience when having to convert statutory consultee comments into conditions.

This conditions guide will also aim to instil a message that were appropriate the imposition of pre-commencement conditions by NRW should be avoided. During the commission we have consulted with a number of local planning authorities and it is

evident a move away from pre-commencement conditions is being promoted by various stakeholders involved in the planning process and mechanisms for the improvement of consultation responses from statutory consultees is greatly supported.

8.213 *Neath Port Talbot CBC:* The Planning system is becoming increasingly more complex, more so after each government makes an attempt to simplify it! What is increasingly evident is that the level of technical detail consultees are requiring to be submitted by a condition of a planning permission is straying into territory which is beyond the remit of planning. This is mainly in relation to technical specifications for highways and drainage although there are also likely to be other technical areas. Can the codification exercise give consideration to this? i.e. make it abundantly clear how far the planning system should go in consideration of certain details ensuring that they do not replace or overlap the responsibilities of other legislation. For example instead of a planning authority imposing a condition requiring technical drawings of all the roads within a development including longitudinal and cross sections, position of lighting columns, drainage runs etc, couldn't we simply say that the roads and associated drainage and lighting shall be designed and implemented to highway adoption standards? The technical details can then be picked up by the highway section under their approval and inspection procedures.

8.214 *Hugh Williams, Edwards Geldard:* Agree that making the disclosure of draft conditions mandatory would be problematic (see CP, para 8.133). However, I suggest that making requests for draft conditions is a matter for the applicant as this may delay an application coming before the decision-maker. If an applicant thinks that seeing the draft conditions is worth the delay then that should be their prerogative. I would therefore support a power to make regulations to enable an applicant to elect to request draft conditions and to specify a period for comments and a duty on the planning authority to consider the comments. Five working days should be a sufficient consultation period. I would also suggest a power to limit the right to specific types of development, for example "major developments" as defined in DMPWO. Although not a matter for the Code, it should be noted that if this suggestion was adopted the key performance indicators for planning authorities for determining applications would need to be adjusted.

8.215 *Andrew Ferguson:* C.o.U through use classes order – it should be clarified whether conditions attached to previous consents apply or not to changes permitted through the UCO / GPDO. Some of these conditions relate to hours of operation / deliveries etc and if they don't follow through (as they should where relevant), a condition restricting future changes would be required. Para 5.71 of the Conditions circular doesn't give a distinction either way.

8.216 *Mineral Products Association:* The sharing of draft conditions by the planning authority with the applicant should become part of the statutory process. Relying solely on "guidance" will inevitably lead to delays and frustrations. This should alleviate the need for developers to apply to vary conditions. The cost of varying or appealing conditions is often high and an applicant chooses not to appeal or vary, but live with the consequences.

CONSULTATION QUESTION 8-11.

In addition to the general power to impose conditions and limitations, it would be possible to make explicit in the Code powers to impose specific types of conditions and limitations, considered in Consultation questions 8-12, 8-15 and 8-16.[1]

Do consultees consider that the powers to impose all or any of these types of conditions (or others) should be given a statutory basis – either in the Bill or in regulations – or should they be incorporated in Government guidance on the use of conditions?

Number of responses

8.217 Total: 38 (4 in general agreement; 7 supporting statutory conditions; 25 supporting conditions being included in guidance, 1 equivocal response, and 1 other).

Responses in agreement (without further comment)

8.218 Monmouth Town Council, Torfaen CBC, Newtown and Llanllwchaiarn Town Council, Institution of Civil Engineers Wales.

Responses supporting a statutory basis for conditions

8.219 *PEBA, The Law Society, Chartered Institute for Archaeologists, Mineral Products Association:* Yes – the power should be given a statutory basis.

8.220 *RTPI, Allan Archer:* We support the approach that the power to impose the following types of conditions is given a statutory basis, applying of Grampian conditions (8.12), commencement date conditions (8.14), conditions relating to other land within the applicant's control (8.15) and conditions relating to the removal of buildings and works and reinstatement of land following the expiry of a time limited planning consent (8.16).

8.221 *Huw Williams (Geldards)*: Agree that there are types of condition that should be specifically authorised.

Responses supporting conditions being included in guidance

8.222 *PINS:* PINS considers that this should be left to guidance.

8.223 *Blaenau Gwent CBC:* The nature, use and application of conditions is better left to detailed guidance once the general power to attach conditions is conferred by the Code.

8.224 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC, Rhondda Cynon Taf CBC:* Government guidelines is the best place, may cause unnecessary confusion if moved.

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[1] Note that Question 8-11 in the Consultation Paper erroneously referred to questions 8-11, 8-14 and 8-16. We are grateful to the respondent who pointed out the error.

8.225 *CLA, Merthyr Tudfil CBC, Newport City Council, Neath Port Talbot CBC, Bridgend CBC, Canal & River Trust:* We consider that this should be incorporated into Government Guidance.

8.226 *Flintshire, Denbighshire, Gwynedd and Ynys Mon* Council *Legal Services, Lawyers in Local Government:* Yes and these can be dealt with in Government guidance as currently.

8.227 *POSW South East Wales, Cardiff Council &* Caerphilly *CBC:* The proposals subject of question 8-10 would broadly control the nature of conditions, but some flexibility needs to be allowed for Government guidance to allow practice within that legislation to be adapted to the needs of the planning and development.

8.228 *Theatres Trust:* The Trust considers that such conditions should be set out within guidance on the use of conditions rather than within the Bill or other regulations in order to afford flexibility to planning authorities to react to particular circumstances or local requirements.

8.229 *Home Builders Federation:* The HBF see no need for certain conditions to be identified in the legislation as required, this could however be contained within guidance.

8.230 *Keith Bush:* It would be less likely to create confusion if examples of ways of using the general power to set conditions/restrictions were put in guidelines rather than the Code itself.

8.231 *Natural Resources Wales:* This is a complex area of planning law and by specifying these conditions in the Bill, it would provide clarity as to what type of condition could be imposed.

Equivocal responses

8.232 *Redrow Homes:* There is some confusion here. Whether a planning condition is necessary must be assessed on a case by case basis and there should not be general power to impose conditions explicitly via the Code unless it is merely referring to requirements for timescales to implement permission etc.

Other comments

8.233 *Huw Evans:* Far too many conditions are imposed unnecessarily. They can cover matters that have already been submitted or that could have been dealt with during the consideration of an application. There is a concern that some authorities are using the discharge of conditions as a means of generating more income.

CONSULTATION QUESTION 8-12.

We provisionally propose that the Code should include a provision enabling the imposition of conditions to the effect:

(1) **that the approved works are not to start until some specified event has occurred (a Grampian condition); or**

(2) **that the approved works shall not be carried before:**

- **a contract for the carrying out of some further specified development has been made; and**

- **planning permission has been granted for the development that is the subject of the contract.**

Do consultees agree?

Number of responses

8.234 Total: 37 (31 in agreement, 1 equivocal responses, 4 in disagreement, and 1 other).

Responses in agreement (without further comment)

8.235 PEBA, Institution of Civil Engineers Wales, CLA, Glamorgan Gwent Archaeological Trust, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Pembrokeshire CC, PINS, Lawyers in Local Government, Keith Bush, Bridgend CBC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC; Huw Williams (Geldards)

Responses in agreement (with additional comment)

8.236 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC & Rhondda Cynon Taf CBC:* Agreed. Done through guidance not necessary in the code.

8.237 *Blaenau Gwent CBC:* If the code is to enable such conditions, it must provide guidance on the consequence of a breach of that condition e.g. invalidation of the permission.

8.238 *Theatres Trust:* The Trust supports this proposal, which reflects the example set out in our response to Question 8-9 and thus would formalise the ability of such conditions to be implemented.

8.239 *Chartered Institute for Archaeologists:* Yes. Grampian conditions are key mechanisms to secure public benefit in relation to the historic environment (and, in particular, historic assets with archaeological interest) and should be clearly recognised as such.

8.240 *Home Builders Federation:* It may be possible for the work required under the contract not to require planning permission so the words ‘if required’ should be added to the end of the second bullet of point 2.

8.241 *Sirius Planning:* We support the proposal to specifically allow for Grampian conditions and conditions requiring a contract and planning permission for third-party works to be in place. Guidance can provide greater clarity on their appropriate use.

8.242 *Bar Council:* The Bar Council understands that Grampian conditions can sometimes lead to an absence of clarity and can be directed to the occurrence of a variety of events, including legal events, that quite rightly cannot be addressed through a planning application process. To that end point (1) is helpful in reflecting the law currently.

However, the Bar Council considers, that the analogy of Grampian conditions applied in the context of Listed Building works subject to a contract for the carrying out of works of redevelopment is not truly applicable as a general rule to 'contracts' per se. The further analogy might be works under s278 of the Highways Act 1980. These are both backed by statute and are in effect a hurdle required in any event not as a matter of common law contract.

In addition, the Bar Council is not clear what is meant by "a contract for the carrying out of some further specified development".

In short, the Bar Council considers that the power to impose conditions and the type of those conditions should not be overly constrained in statute. It may well be better for this to be a matter for Welsh Govt guidance.

8.243 *Natural Resources Wales:* We support this proposal in principle.

8.244 *Friends of the Earth Cymru:* Certain types of conditions must be imposed e.g. in relation to flood mitigation, electric car charging points, or other necessary infrastructure. This would create a level playing field for developers and create a new market for technologies. It would also be a transparent development cost.

Equivocal responses

8.245 *Andrew Ferguson*: Expedited process once development has started – this would be dependent on the nature of the change surely and the level of consultation required? Clarification is required on up until what point you can seek an amendment to the scheme under S73/ S96A. If NMA process is to remain, clarification is required in terms of the NMA process and whether it can be used to both amend (and discharge) a condition. It would be cheaper to re-discharge a materials condition than to submit a revised NMA/ S73 application. If the description of development is widened (to include LB and CA consent for example etc), this section will need to be carefully worded to explain what it does and doesn't relate to (i.e. will you be able to make minor modifications on LBs without requiring consultation)?

Responses disagreeing

8.246 *Redrow Homes:* Redrow fails to see the requirement of this and why the ability to attach planning conditions does not adequately cover this.

8.247 *Caerphilly CBC, POSW South East Wales & Cardiff Council*: No, The proposals subject of question 8-10 would allow Grampian conditions, and that could be clarified by Government guidance.

Other comments

8.248 *IHBC:* This would affect listed building conditions, effectively proposing that some conditions that can be applied to LBC might also be made applicable to other permissions. IHBC would endorse the retention of these conditions as they are necessary for retaining the existing protection for LBs, and would also endorse their wider application – for example to unlisted agricultural or industrial buildings, where retention of features in situ might be incompatible with new uses, but their retention as part of the development might be desirable.

8.249 *Michael Kiely:* The law around using Grampians that requires the completion of a legal agreement needs to be looked at. The advice in PPG is odd (you can only use them in exceptional circumstances – they are either lawful or not!) and they can be a very useful tool.

CONSULTATION QUESTION 8-13.

We provisionally consider that it would be helpful:

(1) **for a planning authority to be given a power (but not a duty) to identify from the outset the conditions attached to a particular planning permission that are "true conditions precedent", which go the heart of the permission, so that they must have been complied with before the permission can be said to have been lawfully implemented (the second category identified by Sullivan J in *Hart Aggregates v Hartlepool BC*), as distinct from other conditions precedent;**

(2) **for an applicant to have a right to request an authority to identify which of the conditions attached to a particular permission that has been granted are true conditions precedent; and**

(3) **for an applicant to have, in either case, a right to appeal against such identification, without putting in jeopardy the substance of the condition itself.**

Do consultees agree? Is there any other way in which the status of pre-commencement conditions could be clarified?

Number of responses

8.250 Total: 51 (13 in agreement with all, 10 in partial agreement, 10 equivocal responses, 13 in disagreement, 2 responses providing alternate solutions and 3 others).

Responses in agreement (without further comment)

8.251 Glamorgan Gwent Archaeological Trust, Merthyr Tudfil CBC, Monmouth Town Council, Theatres Trust, Keith Bush

Responses in agreement (with additional comment)

8.252 *Institution of Civil Engineers Wales:* Yes. Unable to suggest any other way in which the consequences of noncompliance, or belated compliance with commencement conditions could usefully be clarified?

8.253 *Allan Archer:* As the report indicates, the pre-commencement issue is extremely complicated. Nevertheless, I think planning authorities would welcome (proposal (1)) a provision which enables (but does not require) them to designate a condition as a 'true condition precedent'. A consequence of a power rather than a duty is that there may then be cases where either the planning authority have imposed a condition or conditions precedent but not designated them as 'true conditions precedent' (either because they overlooked the question or mistakenly did not consider them 'true conditions precedent'). In such cases, would 'true conditions precedent' not designated still have the force of 'true conditions precedent? Since there is scope for uncertainty and for differences of interpretation, proposals (2) and (3) seem sensible.

8.254 *National Trust:* Agree that it would be helpful if there was a system for identifying which pre-commencement conditions were "true condition precedents", i.e. those that go to the heart of the planning permission. Support a provision for the applicant to request the identification of these by the planning authority.

8.255 *Newport City Council:* Yes, it alerts developers to the key issues. Also very useful in respect of enforcement but also needs to be made explicit in legislation that failure to discharge nullifies the permission. Alternatively, for true conditions, there is an argument that the specific issues are so fundamental that they need to be resolved as part of the determination of the application, and not imposed as conditions.

8.256 *RTPI*: We agree that it would be helpful if there was a system for identifying which pre-commencement conditions were "true conditions precedent", i.e. those that go to the heart of the planning permission. A provision for the applicant to request the identification of these by the LPA (or Planning Inspectorate or Welsh Government if the decision is granted on appeal or via the call in procedures) is essential. In relation to (3), we assume this suggests an appeal purely about the definition of a condition as a true condition precedent without any consideration of the principle of the decision being considered? Further consideration could be needed here as it may lead to an upsurge in appeals about conditions, which may not be the intention of the proposal.

8.257 *Huw Evans:* Agree that it would be helpful if there was a system for identifying which pre-commencement conditions were "true condition precedents" i.e. those that go to the heart of the planning permission. There are too many instances where such conditions are imposed and then used by development managers to frustrate the commencement of development.

8.258 *Natural Resources Wales:* We welcome this proposal in principle. As stated previously in answer to Question 8-11 this is a complex area of planning law. However, we advise that the reasoning and intent behind these conditions should be clearly explained in the Bill and what the implications of the proposal are so that they can be easily understood by all users of the planning system.

8.259 *Cardiff Council*: Agree. Define what constitutes a True Conditions Precedent would be helpful to as to avoid inconsistency across the LPAs in Wales, and to bring together the rulings of the Courts in respect of such matters.

Responses in agreement with (1) but not (2) or (3)

8.260 *Merthyr Tudfil CBC:* (1) Agreed. (2 and 3) Disagree - Unnecessary burden. 'true' conditions could/should be identified in the circular

8.261 *Pembrokeshire Coast NPA, National Parks Wales:* Agreed to but not Duty. In National Parks landscaping conditions can be crucial but are often seen as 'sweet additions' and nice to have but not really important.

2) Disagree. How would this be done, through an application? Untidy and very bureaucratic.

3) Disagree. This appeal process demonstrates the bureaucratic nature of this proposal.

They could be clarified within the wording of the condition itself – and there is already a right to appeal conditions. Keep it simple. The above makes it more longwinded and is unnecessary.

8.262 *Pembrokeshire CC, POSW, Monmouthshire CC, Ceredigion CC, Rhondda Cynon Taf CBC:* (1) Agree to power but not duty. The Circular on conditions emphasizes the need for the most important conditions to feature at the beginning of a decision notice and advises contact with applicants about the timing of requirements. This power or duty would appear to be aimed at addressing an historic situation where older permissions including pre-commencement conditions were imposed that did not go to the heart of the matter. If a condition is not a true condition precedent then arguably it should not have a pre-commencement requirement.

(2) Seems an unnecessary burden, often it is clear from Officers reports what the main issues are in respect of a development. The applicant will generally be able to establish what the conditions precedent are from the report.

(3) Disagree- by allowing the right to appeal it is unlikely that LPA will identify any true conditions precedent under the duty in order to avoid such appeal situations. The existing appeal system covers conditions and it is not considered this needs to change.

Difficult to clarify as non-compliance will be very much based upon fact and degree for each individual case.

8.263 *Carmarthenshire CC:* Agree to power being given to LPAs to identify which conditions go to the heart of the permission but this should not be made a duty. This may be an unnecessary burden, often it is clear from Officers reports what the main issues are in respect of a development. The applicant will generally be able to establish what the conditions precedent are from the report.

Disagree that where the LPA do decide to exercise this new power that there should be a right of appeal for the applicant. Allowing the right to appeal it is unlikely that LPA will identify any true conditions precedent under the duty in order to avoid such appeal situations. The existing appeal system covers conditions and it is not considered this needs to change.

8.264 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* It may be helpful to identify which conditions are true condition precedents at the outset as suggested. These types of conditions tend to at issue if there is a dispute over whether a development has commenced. It then becomes critical to determine their status to avoid arguments that the planning permission is no longer extant. In terms of options, agree (1) but not (2) or (3). These do seem onerous and there are appeal mechanisms in place which can address these issues.

Equivocal responses

8.265 *Bridgend CBC:* Yes to 1) (power but not duty) and 3) (although this could be circumvented by identifying a consistent approach across Wales with regard to the type of conditions that are likely to go to the heart of the consent but no to 2) as that would be an unnecessary burden on LPAs and would only serve to encourage developers to implement some schemes without discharging the conditions attached to the consent. If a condition is not complied with prior to the development going ahead the enforcement of that condition is a matter for the LPA but all other conditions would still apply and developers could not extricate themselves from all conditions just because one condition, that is seen as going to the heart of the permission, has been breached.

8.266 *Friends of the Earth Cymru:* On pre-commencement conditions – if they are to the heart of the permission then without them the development should be unlawful. The right of appeal should not be required as the issue of whether there are pre-commencement conditions that go to the heart of whether the development should go ahead, should be resolved during the planning process itself.

8.267 *Douglas Hughes Architects Ltd.:* There is considerable confusion around pre-commencement conditions applied to planning applications. In some cases, planning officers seem not to understand the terminology included in conditions, which gives rise to great uncertainty as to the actual deliverability of an approval. In our work with some English authorities, they will note some conditions as ‘conditions precedent’, in bold, as part of the planning approval. This avoids any ambiguity as to whether a condition goes right to the heart of an application and requires full compliance prior to commencement. We would suggest that this be looked into as potential good practice.

8.268 *Caerphilly CBC and POSW South East Wales:* (1) This would be fine if there was some agreement as to what constitutes a true condition precedent, and what goes to the heart of a permission. We suspect that practice varies across the country depending on how cautious the LPA is. Better guidance would be of more value, with an emphasis on reducing the number of pre-commencement conditions. No objection to (2) in that an LPA should be accountable in that respect, and (3) a right of appeal would be sensible, and may in time provide a number of decisions that would form the basis of a common approach to what is a true condition precedent.

8.269 *Accessible Retail:* We support this provided that the decision of the authority (whether to identify or not identify) is binding and cannot be changed or added to afterwards. Also, we believe a duty should be placed on the LPA to identify which pre-commencement conditions are considered go to the heart of the permitted development and that it should be possible to appeal this decision. We recommend the Law Commission looks at the 'graded' approach to these conditions adopted by Sheffield City Council as this is well regarded by the development industry.

8.270 *Pembrey and Burry Port Town Council:* The Committee was agreed that something needed to be done to reduce the uncertainty over the issue of pre-commencement conditions. They could see situations where granting authorities the power (but no duty) to categorise certain conditions as "true conditions precedent", would be open to abuse should an authority have a grievance with particular developers or even be too closely connected with other developers. They considered it may be better for authorities to have the power and a duty to set certain conditions as "true conditions precedent".

In relation to the commencement of development without complying with all of the conditions attached, the Committee urged caution in the codifying of the planning concepts. They could see the case for clarification but also for that clarification to become so dense as to become confusing.

8.271 *Planning Aid Wales:* PAW is concerned that identification at the outset may not be easy and notes that in Hart, Sullivan J observed that whether or not development had commenced may depend on the number of conditions which have not been complied with. If identifying certain conditions but not others were definitive, it would seem to prevent later reasonable challenge to the question of whether or not development had commenced. However, PAW suggests it could help if Welsh Government Officials worked with the Planning Officers' Society for Wales and representatives of the development industry to produce a set of guidelines on best practice in relation to pre-conditions.

8.272 *Central Association of Agricultural Valuers:* We are concerned that whichever method of compliance is introduced, it should be easy for a buyer to identify whether a development has been lawfully implemented.

8.273 *National Grid:* Whilst there is much to commend finding a manner for the consistent operation of pre-commencement conditions, it may be that the challenge is finding a mechanism that works the same in each planning authority area. We can see that finding a test which is likely to contain subjective elements, but will nevertheless operate in a consistent and objective manner is likely to be difficult. Guidance for planning authorities and applicants may assist in taking this proposal forward, and help to reduce what appears to be an increase in complexity in the operation of such conditions.

Responses disagreeing

8.274 *PEBA:* On balance, we do not support these proposals. Where identification of "true" conditions precedent is concerned, we understand why it is desirable to seek to do so by legislation. However, we doubt whether that can be done in a way which would cut down on resulting litigation. Equally, if a planning authority is in a position to

decide that a condition framed as a condition precedent is not actually one which they would say should not render commencement of development unlawful if carried out in breach of it, then that condition should not have been expressed in those terms in the first place. The same applies to the suggestion that applicants should have a right to request such an identification. Again, if the authority does not regard a certain matter as being so important that they feel the need to stipulate that it should be approved before any development can commence, then they should not make any such stipulation by imposing such a requirement in a condition requiring approval before commencement of development.

One unintended consequence of the Whitley principle is that development which has been carried out in breach of a condition precedent and subsequently becomes immune from enforcement action is able to continue free from any conditional controls also imposed under the planning permission itself. We invite the Commission to consider whether this problem might be resolved through a new statutory provision that deems any such development to continue to be subject to the conditions imposed by the planning permission. An alternative might be to impose a new statutory requirement on the landowner/developer to apply within a stated period to the local planning authority for the imposition of a fresh series of conditions to control the development, with the sanction for failure to apply being that the development is deemed to be in breach of planning control following expiry of the stated period.

8.275 *Blaenau Gwent CBC:* Do not agree. Whilst this sounds a good idea, I remain unconvinced it would work in practise. Case law and custom across LPA's might differ so better and more up to date guidance might be a better solution. Further, introducing a system whereby conditions are somehow ranked in importance might have the unintended consequence of downgrading the status of what might be then deemed conditions of lesser importance.

8.276 *Andrew Ferguson:* Disagree with (1), (2) and (3). Surely, it would be easier to provide advice in the development manual as to what conditions are likely to require discharge prior to the commencement of development (and therefore go to the heart of the permission) or at a later stage and provide examples of different situations where it would be expected that certain, general conditions are met. The LPA should and do consider the question of whether conditions go to the heart of the permission when imposing conditions in the first instance and the tests also apply – as in, is it necessary to have the details prior to the commencement of development or at a later stage? The applicant can appeal conditions if they so wish.

Therefore, all "pre-commencement" conditions should be "condition precedent" otherwise you could require the details at a later stage. Guidance on the timing of conditions would appear to be what is required rather than two types of "pre-commencement" conditions. I do not consider this provision to be overly helpful and in any event. The applicant has the right of appeal against the condition in any event, as they do at present so I can't see the point of another layer of complexity when the intention is to simplify the system. What would happen if the Inspector considered that the condition was an inadequate way to deal with the problem and was of the opinion that permission should have been refused? Adding an additional type of appeal adds to the complexity and bureaucracy of the system and should not be introduced. Whilst simplifying on one hand, you are complicating on the other. In any

event, surely the decision could still end up in court as an enforcement matter whether it was stated on the DN or appealed to the WMs as it would still come down to a legal argument if a permission is implemented without discharging relevant pre-commencement conditions?

In addition, with the requirement to notify the LPA of the commencement of development (on major schemes at least), these issues should be resolved prior to the commencement rather than at an enforcement stage. If they haven't complied with a condition, they would be advised as such. There would be no real point in a pre-commencement condition that doesn't go to the heart of the permission as details could be submitted at a later stage (after lawful implementation).

Requiring all applicants to notify the authority of implementation would also be useful to ensure that smaller schemes don't slip through the net in terms of adherence to pre-commencement conditions. However, whilst this should be included in legislation, it should also be made explicit that conditions to this effect should be attached to any grant of consent so that all users are aware of the requirements upon them from the outset.

Essentially, condition precedent (and legislation) comes from situations where conditions of consents have not been complied with. Whilst the legislation change will not change the historical context in this regard, it should be made clear that all pre-commencement conditions going forward are conditions precedent and if the applicant does not agree with this approach, they should seek to appeal the condition at the outset. That is when the issue should be resolved – not years later when these conditions have not been complied with.

In terms of pre-commencement conditions, it should be clear that they should be able to be discharged provided the consent has not expired. Other conditions should still be able to be discharged at a later date providing the permission has been implemented lawfully. If details are refused – the applicant would have the right of appeal.

PINS: Is this really an issue that warrants this level of intervention? If this is pursued, it would need to be backed up with clear guidance (in the Development Manual?) as to what constitutes a true condition precedent. With regards to PINS and the appeal system, if the intention is not to look at the substance of the condition, what happens where PINS gets one where a 'true condition precedent' is badly worded (i.e. it does not meet the 4 tests) - can we then 'sign it off'? The idea of limiting the scope of the appeal may need further thought.

8.277 *Home Builders Federation:* The HBF are concerned by this proposal and think that it could add extra complication rather than clarity. We note that the use of pre-commencement conditions has been growing and is causing considerable delay in bringing development forward. There is also now a requirement to state that pre-commencement conditions have been complied with on a site notice which is required to be displayed once development commences on site. It would be more helpful if the use of pre-commencement conditions where limited to those "that go to the heart of the permission".

However we can see that making an LPA justify the use of conditions precedent use will make them consider more carefully and not just apply a standard list of conditions to a scheme resulting in a poor set of conditions that holds back development. Agreeing conditions beforehand (as per proposals in England and currently in the WG circular 016/2014) would give more certainty and speed up the delivery of development. Whatever changes are made, they must not be at the cost of unnecessarily or result in the slowing down of the determination of applications / conditions.

8.278 *Community Housing Cymru:* Our members have highlighted a certain level of confusion and frustration around pre-commencement conditions, namely the ever-increasing number of conditions and, at times, their relevance. The Planning Law in Wales consultation suggests a categorising of these conditions, in that the Local Planning Authorities (LPA) could categorise certain conditions as 'true conditions precedent, thus distinguishing between genuine conditions and supplementary ones. This approach may lead to one form of appeal simply replacing another, and we would suggest that, instead, guidance is provided to applicants so that they can appeal against any condition(s) and to LPAs to guide them on what can be reasonably stated as a condition. This would provide consistency across authorities, and save all parties time and resources by reducing arguably unnecessary resubmissions of information.

8.279 *Torfaen CBC:* No. LPA'S should simply think more about when it is necessary for information to be submitted and agreed. This in itself will reduce the number of conditions precedent and clarify their status. Maybe clearer guidance should be produced on what is a "true conditions precedent".

8.280 *Sirius Planning:* We disagree with the proposal to categorise some conditions as 'true conditions precedent'. Not all local authorities enter into a constructive dialogue with applicants about the drafting of conditions and given that the proposal at 8.136 suggests sharing of draft conditions is a matter for guidance, a re-categorisation could result in a large increase of appeals to vary the wording of conditions.

8.281 *Mineral Products Association:* if pre-commencement conditions which go to the heart of the permission are to be identified, this should be applied to all consents across the board and not simply left for the authority to choose. This would alleviate the need for point 2). We agree that the applicant should have the right to appeal against such identification, without putting the substance of the condition in jeopardy.

8.282 *The Law Society & Huw Williams (Geldards):* We agree that this is a problem that arises reasonably frequently. A typical example is where a minimal amount of development sufficient to constitute a commencement of development has been carried out to make a permission permanent and it is then discovered that there was a failure to comply with a pre-commencement condition.

8.283 *Neath Port Talbot CBC:* (1 & 2) Disagree - Are we then dumbing down the importance of those pre-commencement conditions which do not 'go to the heart' of the consent and potentially encouraging applicants to ignore them? It is fair to say that planning authorities have relied too heavily on standard conditions over the years. In theory pre commencement conditions should be limited, but it is accepted that this is not always the case.

Secondary legislation or guidance rather than primary legislation should be giving greater clarity on the use of and importance attributed to conditions. We should also be reminding officers that conditions should meet the tests as referred to earlier under question 8-10 and we should not be preventing all development on site until we have had for example a landscaping scheme as this clearly is not a pre-commencement condition, rather a condition where the details must be approved prior to the occupation of the development or similar.

The proposal seems to be introducing an unnecessary burden, especially given that it is often clear from Officer's reports what the main issues are in respect of a development. Furthermore the decision notices as currently required by Welsh Government are formatted so that we put the pre-commencement conditions at the beginning, then the pre-occupation conditions etc i.e. they are ordered in terms of priority at present.

(3) Disagree- given that the overall principle is not accepted as described above

8.284 *Bar Council:* The Bar Council understands the fact that the issue highlighted above has been the subject of debate before the Courts and also appreciate that this may not necessarily have achieved the sort of clarity that would be welcome. The Bar Council considers that the addition of a process however whereby the planning authority or decision maker may be required to identify what it thinks amounts to a "true condition precedent" is not an answer to the questions that arise at law in any event. In other words, whilst it might provide some clarity or protection for a developer in its relations with the planning authority, the interpretation of a condition remains a matter of law and hence ultimately for the Courts. In addition, it is not clear how a further appeal process on the specific issue would add fairness and clarity at or beyond the right to appeal against the imposition of a condition following the grant of appeal available in any event.

Other solutions to the problem of pre-commencement conditions

8.285 *CLA:* Yes - by prohibiting the granting of planning permission subject to a pre-commencement condition without the written agreement of the applicant to the terms of the condition(s), subject to exceptions.

8.286 *Mineral Products Association:* At paragraph 8.101 and with regard to pre-commencement conditions, we would like to see a similar approach to that now in force in England.

Other comments

8.287 *Community Housing Cymru:* While we would advise against the proposed categorisation of genuine and other pre-commencement conditions, we would suggest that a different form of categorisation might resolve a related problem highlighted by our members. The issue is of developers not receiving proof of planning permission, including confirmation that they have fully and correctly discharged the stated pre-commencement conditions at or towards the end of the development. This confirmation is often required for lenders to have proof of compliance of the planning process, and members have experienced problems with this; records such as current decision notices or a lack of action on non-compliance

are not sufficient for lenders, and a lack of concrete confirmation of compliance can be a barrier to completion of a project. While the LPAs cannot 'sign off' on all conditions, since other parties may be involved, we suggest that a categorisation of conditions for this purpose would be helpful. The first category would include those that the LPAs must approve in order for planning permission to be granted and therefore are able to confirm compliance on, and the second category would include those that it cannot.

In 2017 we released our 'Planning for 20,000 Homes' paper, in association with the Home Builders Federation and the Federation of Master Builders, designed to highlight a number of constructive ideas which would enable our respective members to overcome issues in the planning system. We recommended in this paper that there should be a reduction or elimination of pre-commencement conditions from RSL planning consents, and that pre-occupation conditions could be used instead. This approach would resolve some of the delays in the process, but we consider that the aforementioned confirmation of compliance would also be necessary in this situation to allow for the completion of the project and the occupation of the development.

8.288 *Law Society & Huw Williams (Geldards):* The power to identify a "true condition precedent" is an unhelpful concept because it depends upon the facts and circumstances of each application, so we disagree with the proposal and suggest the following solution.

Having enshrined a statutory test for a valid planning condition, our view is that the appropriateness of a condition precedent should be determined by reference to the tests of whether it is necessary to make the development acceptable and whether it is relevant to the development and to planning generally. Applicants who consider that these tests are not met should be able to appeal to status of the condition as a pre-commencement condition. Manifestly inappropriate pre-commencement conditions would see a planning authority penalised in costs on appeal. Alternatively, the expedited procedure in ss.62ZA to 62ZD of the T&CPA might be adapted for such pre-commencement appeals.

While we agree that it would be burdensome to expect a planning authority to grapple with the question of whether a condition goes "to the heart of the matter", the application of the tests for the validity of a condition to the question of whether the nature of the development truly requires the condition either to be met before development can begin or is needed at all ought to be much easier for a planning authority to identify. Consequently, requiring a planning authority to identify a condition as a pre-commencement condition on this basis should not be unduly burdensome.

In addition, it would clarify matters and avoid disputes if the Code then made it clear that pre-commencement conditions of the kind proposed must have been complied with before a valid commencement of development can take place. Further guidance on pre-commencement conditions meeting the statutory tests could then be issued to support these suggested arrangements.

There is persistent concern that planning authorities will sometimes delay approval of details so that the permission expires before they are approved. Appealing in such instances is of not a complete solution as the permission may expire during the

appeal. Accordingly, we suggest that if there is an appeal made in respect of non-approval of details, that the permission remains live until the appeal is determined and for a reasonable period to allow commencement of development thereafter (which could be determined as part of the appeal). If an authority has acted unreasonably then they may be penalised in costs.

CONSULTATION QUESTION 8-14.

We provisionally propose that the Bill makes plain:

(1) **that development must be commenced by the date specified in any relevant condition;**

(2) **that any phases must be commenced by the date specified in any condition relevant to that phase; and**

(3) **that in the absence of any such condition the development must be commenced within five years of the grant of permission.**

Do consultees agree?

Number of responses

8.289 Total: 36 (31 in agreement, and 5 equivocal responses).

Responses in agreement (without further comment)

8.290 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, PINS, Newport City Council, Torfaen CBC, Bridgend CBC, Newtown and Llanllwchaiarn Town Council, Lawyers in Local Government, Keith Bush, Natural Resources Wales; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

8.291 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, but presumably the default date that most LPAs would use would still be five years.

8.292 *Pembrokeshire CC:* 1-3 Agreed, albeit that if outline permissions are not abolished the timescale for implementation of reserved matters would need to be specified.

8.293 *The Law Society & Huw Williams (Geldards):* We agree, save that in view of our response to the previous question on pre-commencement conditions we propose a default position of five years from the grant of permission or, where there are pre-commencement conditions identified five years from the discharge of the last pre-commencement condition. This seems consistent with a policy approach that a permission should remain “live” for a period of five years.

8.294 *Mineral Products Association:* experience would suggest that the period of 5 years within which a development must be commenced, is appropriate, particularly for major developments. Delays by authorities in determining pre-commencement conditions often extending to years are not unheard of. There is no need to reduce the period below 5 years.

8.295 *Neath Port Talbot CBC:* 1-3 Agreed. It is accepted that planning permissions have a five-year lifespan unless otherwise specified by practitioners, but time conditions are imposed to make it clear to applicants who are less familiar with the planning legislation.

8.296 *RTPI:* This proposal can only apply to proposed developments and not to any permissions being granted for existing completed development or un-phased developments currently underway. Subject to this, we agree that the details of conditions relating to a commenced by date are included in the Bill and that this is done by providing a specific date by which initial commencement must occur. We agree that in the case of permissions for proposed developments there is a catch all time limit of 5 years where no commencement date is given.

8.297 *Canal & River Trust:* Section 91 of the TCPA provides that a planning permission is deemed to be granted subject to a condition that the development in question must be commenced within five years of the grant of permission, unless an explicit condition states otherwise. The proposal appears to move away from this default by requiring the LPA to consider in the first instance the date by which development should commence. We consider that any wording should maintain the 5 year period as a starting point to provide certainty in the operation of the system unless the LPA consider it necessary to set a different period having regard to the tests for conditions.

Equivocal responses

8.298 *CLA:* Yes for 8-14 (1) and (3). No for 8-14(2) Developers must be able to respond to market forces and should not be bound to start by a specific date. However, if date critical, a section 106 agreement can be negotiated and binding on the developer.

8.299 *Home Builders Federation:* Although the HBF supports the first part of the suggestion 'that development must be commenced by the date specified in any relevant condition' concern is raised at the second part. The difficulty we envisage is around who decides when a phase should start, unless this information has been provided with the application or agreed with the developer the planning authority would be just guessing. There may be circumstances when certain elements of the development need to be started in a set time period or are triggered by reaching a certain level of development (often used in S106 agreements), but this is different to phases.

8.300 *Redrow Homes:* Redrow is concerned with the proposal for phases to be commenced by specified dates. Phasing is usually a matter dealt with via a planning condition in any event. Currently, the timescale for submission of reserved matters will control how long a development takes place, unless it was a full permission in the first instance. This process is well understood and so Redrow does not see any benefit in changing this.

8.301 *RTPI:* With regard to any phasing requirements would a more appropriate wording be "that identified phases cannot be commenced before a specified date or time lapse period, which might relate back to the commencement dates for earlier phases of the development."?

8.302 *Sirius Planning:* We are concerned that the proposal to allow planning authorities to specify 'commencement by' date in the decision notice will negatively impact on what is typically a commercial decision. Whilst planning authorities may wish to encourage development to get underway as soon as possible, particularly with regard to housing developments, reducing the shelf-life of permissions introduces significant commercial risks to developers.

CONSULTATION QUESTION 8-15.

We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions to the effect that the development or use of land under the control of the applicant (whether or not it is land in respect of which the application has been made) should be regulated to ensure that the approved development is and remains acceptable. Do consultees agree?

Number of responses

8.303 Total: 32 (30 in agreement, 1 in disagreement, and 1 other).

Responses in agreement (without further comment)

8.304 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, National Trust, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Keith Bush; Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with additional comment)

8.305 *POSW, Monmouthshire CC, Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Agreed. The Authority considers that this should be stated in the bill and an example condition in Welsh Government guidance.

8.306 *Mineral Products Association:* whilst we are not opposed to conditions being applied to land within the applicant's control, the scope of these conditions should be defined in the legislation as per the example cited in the consultation. Again, conditions which require the applicant to provide something that is "nice to have" must be resisted. Whilst time limited conditions are routinely applied to minerals development, the greatest abuser of the time-limited conditions are the local authorities themselves, particularly where this involves temporary offices and classrooms. As local authorities will not enforce against themselves, we would seek clarification of the powers available to ensure this abuse does not continue.

Responses disagreeing

8.307 *CLA:* No. Applicants may seek to offer other land to be conditioned in addition to the application site. But for example, with large rural estates, the proposals here would suggest allowing the planning authority to condition land anywhere else on the estate without limits. There must, surely be some relevant connection between the application site and "other land".

Other comments

8.308 *Central Association of Agricultural Valuers:* We strongly believe that where lawful development has been carried out it should not be possible for that development to later become unacceptable in planning terms, perhaps as a result of a policy change. Such a system would bring undue risk and uncertainty to developers. However, where unacceptable and unlawful changes have been made to an approved development then we believe it should be possible to take enforcement action.

We do not believe the use of land not included in any planning application should be regulated to ensure that it is acceptable, use of land must however be lawful.

CONSULTATION QUESTION 8-16.

We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions where permission has been granted for a limited period, to the effect that the buildings or works authorised by the permission be removed, or the authorised use be discontinued at the end of the period, and that works be carried out at that time for the reinstatement of land. Do consultees agree?

Number of responses

8.309 Total: 30 (29 in agreement, and 1 others).

Responses in agreement (without further comment)

8.310 Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, National Trust, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC; Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with additional comment)

8.311 *PEBA:* Yes. We invite the Commission to consider whether the statute should state that where planning permission for the use of land is granted for a limited period, it is subject to an implied condition that the use must cease at the end of the specified period.

8.312 *PINS:* Yes, but this power already exists and regard should be had to the advice in paragraphs 5.22 to 5.29 of Circular 14/16 particularly with regard to proposals for buildings which are clearly intended to be permanent.

Other comments

8.313 *Andrew Ferguson:* In terms of temporary consents, it may be useful to consider including a condition limiting "temporary consents" to the period specified in the description of development (taken from the date of the decision notice) if a condition is not attached to cover clear errors. As case law indicates, this has not been the situation in the past and residents/ members of the public have suffered as a result of an error from the LPA (in not attaching a temporary condition to the consent). Whilst most LPAs are aware that conditions are required – they can be omitted by accident which can have significant effects on a local community.

CONSULTATION QUESTION 8-17.

We provisionally consider that a provision equivalent to section 72(3) of the TCPA 1990 (as to time-limited conditions) should be retained in the Code, but drafted so as to make clear that it applies only in the case of:

(1) **time-limited permissions issued under what is now section 72(1)(a); and**

(2) **some time-limited permissions issued between 1960 and 1968.**

Do consultees agree?

Number of responses

8.314 Total: 29 (28 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

8.315 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush; Huw Williams (Geldards), Cardiff Council

Responses in agreement (with additional comment)

8.316 *Rhondda Cynon Taf CBC, Ceredigion CC, Carmarthenshire CC, POSW, Monmouthshire CC, Pembrokeshire Coast National Park Authority & National Parks Wales*: Agreed if it clarifies the situation for all.

Equivocal responses

8.317 *RTPI*: We assume this provision is to fill a current gap in the legislation?

CONSULTATION QUESTION 8-18.

We provisionally propose that the Bill, or regulations under the Bill, should enable the imposition of conditions to the effect:

(1) **that particular features of the building or land to which the permission relates be preserved, either as part of it or after severance from it;**

(2) **that any damage caused to the building or land by the authorised works be made good after those works are completed; or**

(3) **that all or part of the building or land be restored following the execution of the authorised works, with the use of original materials so far as practicable and with such alterations as may be specified.**

Do consultees agree?

Number of responses

8.318 Total: 32 (25 in agreement, and 7 equivocal responses).

Responses in agreement (without further comment)

8.319 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC and POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Monmouth Town Council, Theatres Trust, PINS, Newport City Council, Torfaen CBC, Bridgend CBC, Newtown and Llanllwchaiarn Town Council, Keith Bush, Cardiff Council

Responses in agreement (with additional comment)

8.320 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government, Carmarthenshire CC, Pembrokeshire Coast NPA, National Parks Wales:* Yes, in principle although they may not be precise enough to enforce and suggest that the above could be dealt with by way of a condition requiring the submission and approval of a method statement.

8.321 *Allan Archer:* I agree with these proposals for the reasons set out, providing that the existing Listed Buildings Act power to take action against any person other than the original applicant is retained.

8.322 *Chartered Institute for Archaeologists:* Yes. However, we would also like to have seen some consideration as regards the issues relating to conditions affecting historic assets with archaeological interest, the significance of which is non-renewable. For instance, clarification of the ability partially to discharge archaeological conditions would be helpful – an issue raised in a different context by the Law Society in its response dated 25 April 2014 to Welsh Government consultation on the use of planning conditions for development management [available at: https://consultations.gov.wales/sites/default/files/consultation-documents/141006responses-28-53en.pdf]

8.323 *The Law Society; Huw Williams:* We agree that this is a useful specific power to have generally available, particularly where there are features which do not merit listing but may be of local interest or significance.

Equivocal responses

8.324 *RTPI:* Further clarification is required here. The proposal appears to be introducing potential control over matters and areas that would otherwise benefit from permitted development rights to make certain changes or alterations without requiring planning permission, thereby preventing the implementation of these permitted development rights?

8.325 *POSW, Monmouthshire CC, Neath Port Talbot CBC, Ceredigion CC, Pembrokeshire CC, Rhondda Cynon Taf CBC:* 1. Preserve part of building – shouldn't this be clear from the plans??

2. Damage made good – enforceability?

3. No clarity here – too loose – use of original materials 'as far as is practicable'! How far is that?

Note: Agree with principle, however the conditions would not be precise and enforceable, thus failing to comply with Circular 16/2014. An LPA would be more likely to use a condition requiring a method statement for such works.

CONSULTATION QUESTION 8-19.

We provisionally consider that the Bill should clarify the existing law and procedures as to the approval of details required by a condition of a planning permission, whether imposed at the request of an applicant (in relation to matters not sufficiently particularised in the application) or instigated by the authority itself. Do consultees agree?

Number of responses

8.326 Total: 36 (35 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

8.327 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Home Builders Federation, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, Pembrey and Burry Port Town Council, Allan Archer, Natural Resources Wales, Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

8.328 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, clarity in particular is needed on the status of a reserved matters approval as a consent, and the distinction between conditions seeking reserved matters approval, and those seeking approval of other matters. In recent years, more conditions have been imposed on reserved matters approvals, but an application for approval should not be an opportunity to revisit the principle of the scheme. Also, it is inevitable that some information submitted in respect of reserved matters overlaps with that required by other conditions, but that should not absolve the developer from submitting a separate application for the discharge of those conditions.

8.329 *Planning Aid Wales:* PAW is of the opinion that clarity and openness is required when approval is required after an initial grant of permission. The question of consultation on the terms of approval and whether matters are sufficiently detailed and whether a proposal would meet the purpose of the condition needs to be addressed. This general concern is relevant to questions below affecting the precise details of the final development (e.g. 8-20 – 8.23, below) and should be taken into account for each, but is not repeated separately.

8.330 *Redrow Homes:* In relation to the S.73 procedure Redrow would welcome the clarification from case law that the S.73 application should only consider the matters being applied for. It cannot be used to add additional conditions/controls or re-open S106 negotiations whereby the proposed change does not impact on such matters.

8.331 *The Law Society & Huw Williams (Geldards):* We agree – but see also response to Q8-1 above.

Equivocal responses

8.332 *Friends of the Earth Cymru:* In approving details – there should be a transparent process. A time limit to approve any such details should be reasonable. Enforcement is severely under-resourced in Wales and has the potential to undermine public trust in the system as the whole. There are many examples across Wales of where 'details' such as the route of public access have disappeared, or developments have been visually separated into 'affordable' and market' and this is where the details are important. Variations of conditions can result in undermining the basis of the acceptability of the development e.g. when transport plans are changed repeatedly. We therefore do not agree with an expedited procedure for a variation of permission. What the developer might like to be treated as 'minor' e.g. HGV movements, hours of work, may have a significant effect on the local community. Community councils should be kept much more abreast of the conditions attached to planning permissions in their areas.

CONSULTATION QUESTION 8-20.

We provisionally propose that a planning authority should be able in an appropriate case to decline to determine an application for the approval of one detailed matter

without at the same time having details of another specified matter. Do consultees agree?

Number of responses

8.333 Total: 36 (33 in agreement, 2 equivocal responses, and 1 in disagreement).

Responses strongly in agreement

8.334 *Allan Archer:* I think this would also be a very helpful provision.

Responses in agreement (without further comment)

8.335 PEBA, Institution of Civil Engineers Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, PINS, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Lawyers in Local Government, Keith Bush, Natural Resources Wales

Responses in agreement (with additional comment)

8.336 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Ceredigion CC, Pembrokeshire CC:* Agreed. This makes sense when requiring for example landscaping – soft/hard including boundary treatments and also lighting proposals.

8.337 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, this is sensible since there will be cases where one matter is linked to or dependent upon another, or there may be local reasons for requiring more than one matter to be submitted.

8.338 *Carmarthenshire CC:* Agreed. This makes sense as a number of conditions may be interdependent and without details relating to those that are interrelated the other cannot be fully considered.

8.339 *Rhondda Cynon Taf CBC:* Agreed. This makes sense when requiring for example landscaping – soft/hard including boundary treatments and also lighting proposals.

8.340 *CLA:* Yes in principle. It is unfortunate that the consultation does not prescribe a mandatory time-limit. CLA members (small scale rural economic development in the main) complain that it takes weeks for a response from a planning authority for an approval of details. Ultimately, this delay impacts exponentially on the rural business.

8.341 *Redrow Homes:* The ability for an LPA to request further details before determining an application already exists. Replicating this would be seen as appropriate to Redrow but anything more would require further consideration.

8.342 *The Law Society & Huw Williams (Geldards):* We agree – but see also response to Q8-1 above.

8.343 *RTPI, Huw Evans:* We agree that, providing a justification is provided, LPAs are able to decline to consider one detailed matter without the details for another detailed matter so that their overall impact can be assessed. However there should also be a right of appeal against this if the applicant disagrees with the justification provided.

8.344 *Bridgend CBC:* Yes. Full details of each condition should be included within each discharge of condition application so that the condition as whole can be discharged/agreed in one go.

8.345 *Canal & River Trust:* If such an approach was to be taken, then it would be vital for clear guidance to be given to LPAs on circumstances where this would be reasonable or necessary in order to promote the efficient operation of the system.

Equivocal responses

8.346 *Bar Council:* The Bar Council considers that it is better for planning practitioners to provide their views as to the significance or otherwise of what appears to be at the heart of this proposal, the efficacy of approving matters on condition following the grant of permission (outline or otherwise) however we would raise one general matter. It seems potentially unreasonable for an authority to be given the power to decline to determine an application for approval of a detailed matter which to all intents and purposes is valid and accords with the relevant condition. The Bar Council can see it may be desirable in some circumstances for a planning authority to have a greater range of details available but if that is desirable then surely that is a matter that could be reflected upon the face of the permission prior to grant or simply a matter of request.

8.347 *Home Builders Federation:* The HBF are concerned about this proposal as it could be used by the planning authority to delay determining submitted details. If such a proposal is taken forward then it should include a specified time period in which to ask for the additional information and the right of appeal against any such request, similar to that in place at the application registration stage. As an alternative the HBF would suggest that it may be helpful if the PLA's are required to group together certain matters to be submitted together if that is absolutely necessary. Clear stages or triggers, agreed with the developer, for information required could also help avoid problems in this area.

Responses disagreeing

8.348 *Mineral Products Association:* proposes enabling a planning authority the powers to decline to determine an application for the approval of one detailed matter without at the same time having details of another specified matter. We oppose this, in that it is clearly open to abuse. If an application is valid, the authority has a duty to determine it. There will be occasions where an applicant needs the surety of specific details in order to make further submissions. Whilst we would hope that this short-sighted proposal is not carried through, if it is, the legislation must provide firm details of the limited scope when a planning authority may decline to determine an application.

CONSULTATION QUESTION 8-21.

We provisionally propose that the Bill should clarify the existing law and procedures as to the approval of details required by:

(1) **a condition of a permission granted by a development order;**

(2) **a requirement imposed by a planning authority following a notification of proposed works in a relevant category of development permitted by a development order.**

Do consultees agree?

Number of responses

8.349 Total: 30 (28 in agreement and 2 equivocal responses).

Responses in agreement (without further comment)

8.350 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Equivocal responses

8.351 *RTPI:* We agree that the Bill should clarify the existing law and procedures relating to the approval of details required by a condition of a permission granted by a development order, and a requirement imposed by a planning authority following a notification of proposed works in a relevant category of development permitted by a development order. It's not clear what the proposals are by way of 'clarification'. If change is proposed, we would of course wish to be consulted on the details.

8.352 *Allan Archer:* It is not entirely clear what is proposed but if limited to clarification then I agree. If changes are proposed would like an opportunity to comment.

CONSULTATION QUESTION 8-22.

We consider that it might be helpful for there to be a time-limit within which the planning authority can respond to a notification of a proposal to carry out development in a relevant category (for example, buildings for agriculture and forestry), such that an applicant can proceed if no response has been received to the notification. Do consultees agree?

Number of responses

8.353 Total: 39 (18 in agreement, 6 equivocal responses, and 14 in disagreement, and 1 other)

Responses in agreement (without further comment)

8.354 PEBA, Institution of Civil Engineers Wales, Merthyr Tudfil CBC, Monmouth Town Council, Torfaen CBC, The Law Society, Huw Williams (Geldards)

8.355 Responses in agreement (with additional comment)

8.356 *Theatres Trust:* The Trust cautiously agrees with this proposal in principle, but it relies on planning authorities being appropriately resourced to manage demand on their service. An inability to handle demand in a timely fashion could result in inappropriate or detrimental works taking place.

8.357 *National Trust:* Support, but this is confirming the current position in relation to agricultural and forestry notification.

8.358 *Newport City Council:* Yes, providing existing time limits are not shortened.

8.359 *Chartered Institute of Architectural Technologists:* We agree with the need to implement a time-limit within which the planning authority can respond. From our experience, developments have, at times, been delayed, which adds costs to the process. A time-limit would provide the developers the knowledge that upon a set date, if the authority has yet to respond, they would be able to proceed. A time-limit would also help the authority's administrative side improve their management of applications. Again this must be balanced to ensure that inappropriate applications do not slip through due to the time-limit to make a determination elapsing. We would therefore recommend that the option to add an extension should be available to the planning authority.

8.360 *Central Association of Agricultural Valuers:* We agree that such a provision would be helpful in providing certainty.

8.361 *Mineral Products Association:* we would agree to the imposition of a time limit within which a planning authority must respond to a notification of a proposal to carry out development.

8.362 *Bridgend CBC:* Yes - this is already in place for Agri, Forestry and Telecomms developments.

8.363 *Canal & River Trust:* This would appear to be a useful proposal from an applicant perspective.

8.364 *Douglas Hughes Architects Ltd.:* We are broadly in support of a time limit to approve details of the proposed works under a development order. However this time limit needs to be a maximum of fourteen days without fail. We would suggest that if there is no formal approval of the details of the proposed works by this time then this should be considered tantamount to tacit approval. Somewhere along the way LPAs need to be aware of the stringent timescales at which projects need to be delivered, and be under an obligation to respond in a timely manner.

8.365 *CLA:* Yes (provided the proposed development is fully compliant with the relevant part of the GPDO).

8.366 *Arqiva:* We support this proposal. The Part 24 PDRs include some that are subject to a prior approval process, which is supposed to operate in a two-step manner, i.e. the LPA should indicate first whether it wants to determine details – if not the development can proceed as submitted – if so the LPA should make a second determination on whether it approves or refuses the details submitted. In practice the process never works in this way, with a single decision being reached at the end of the 56 day period.

In highlighting this part of the GPDO, we make two further points for consideration:

- The corresponding provisions in the English GPDO include a mechanism for agreeing an extension to the 56 day period and we suggest this ought to be added in Wales as well.

- Condition A.3 (8) and (8A) of Part 24 allows for the submission and approval of alternative details and we should suggest should have a time limit of 21 days for the LPA to respond, or alternatively the amendments are accepted by default.

Equivocal responses

8.367 *Neath Port Talbot CBC:* The principle of time limits are already in place i.e. 28 days for agricultural and telecommunications notifications? Although this is restricted and 56 days may be more appropriate to reduce pressure on Planning Authorities.

8.368 *Glamorgan Gwent Archaeological Trust:* Notification of development approved in principle by a development order: The time-limit should be one that is sufficient for the authority to take any necessary specialist advice or necessary consultation.

8.369 *RTPI:* It is unclear what new provision is being proposed and further clarification is required here. Our understanding is that under Part 6 of Schedule 1 of the General Permitted Development Order (GDPO), which covers agricultural buildings and operations, the developer must give the authority notification of the proposal before work commences to ascertain if prior approval is required. If no determination is made over whether prior approval is required within 28 days of that notification then the development can commence. The proposal appears to ask for a reiteration of what already exists?

8.370 *Allan Archer:* It is unclear what new provision is being suggested over that which already exists. A proviso (as set out in Keenan) should be that if the Council fail to reach a decision within the timescale the developer may only proceed if the proposal satisfies the permitted development criteria. A failure to respond indicates only that the Council have not responded and I do not agree that it should be regarded as consent to proceed – that arises from the provisions of the GPDO. A reasonable time-limit should allow for assessment, discussion with the applicant and potential amendments.

8.371 *Andrew Ferguson:* In terms of time limits, is the intention to put this in statute rather than in the GPDO? It is not clear what limits are being referred to in this question as there is already a time limit in place for agriculture and forestry notifications in terms of the first questions asked (i.e is prior approval required)? In terms of situations where it is required, it was understood that in practice the Authority would have 8

weeks to determine when further information is submitted otherwise the applicant could appeal non-determination? It would be useful to have a set period for the applicant to submit information once further information has been requested as part of a prior notification approval as well (as they put the site notice up, it is determined that P.A is required and then there is an indeterminate period for them to submit the information. Clarifying whether the submitted day is day 1 or not in the legislation would also be useful.

8.372 *POSW:* Disagree. A non-response is not a good indicator that the lpa doesn't have a view on the proposal. We have examples where notifications have gone to the wrong planning authority – and work has continued as 'no response received'. This could be open to abuse and errors. Landowners may claim that they did not receive notification and continue with the development. Landowners should await notification, similarly to planning permissions prior to starting works. However, there was a small number of Authorities who agreed with the suggestion, giving examples as being similar to telecommunications and other prior notification procedures.

Responses disagreeing

8.373 *Pembrokeshire Coast NPA, National Parks Wales:* Disagree – This could be open to abuse and errors. Landowners may claim that they did not receive notification and continue with the development. Landowners should await notification, similarly to planning permissions prior to starting works.

8.374 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* No. The development may introduce some permanent problem such as an impact on amenity or highway safety.

8.375 *Pembrokeshire CC, Ceredigion CC, Monmouthshire CC & Rhondda Cynon Taf CBC:* Disagree. A non response isn't really a good indicator that the PA doesn't have a view on the proposal. We have examples where notifications have gone to wrong planning authority – and work has continued as 'no response received'. This could be open to abuse and errors. Landowners may claim that they did not receive notification and continue with the development. Landowners should await notification, similarly to planning permissions prior to starting works.

8.376 *Blaenau Gwent CBC:* Do not agree. In my view, the prior notification application procedure is confused, open to abuse and clear guidance on all forms of prior notification (from agric to telecoms to demolitions) should be issued or the entire approach to these sorts of applications re-thought.

8.377 *Carmarthenshire CC:* Disagree – This could be open to abuse and errors. Landowners may claim that they did not receive notification and continue with the development. Landowners should await notification, similarly to planning permissions prior to starting works.

8.378 *Flintshire,* Denbighshire*, Gwynedd and Ynys Mon Council Legal Services:* No, because local planning authorities may prefer a prior approval procedure to allow them to keep track of what has been authorised rather than prior notice as there is always a risk that a notice can go astray.

8.379 *PINS:* No - this could lead to things going ahead that shouldn't in cases where LPAs do not have the resources to respond in time. A perverse response may be for LPAs to refuse to approve things just to meet the timescales.

8.380 *Keith Bush:* Disagree – defining relevant circumstances would be difficult and would be contrary to the principle of allowing planning permission to be given because of pressure on the resources of planning authorities.

Other comments

8.381 *Redrow Homes:* Redrow would put forward whether, in line with the notification procedures in place for works to trees in conservation areas, a timescale for discharge of conditions should be set, subject to extensions with agreement, before a deemed approval is gained.

CONSULTATION QUESTION 8-23.

We provisionally consider that it might be helpful to bring together the procedures for seeking amendments to planning permissions, currently under section 73 and 96A of the TCPA 1990, into a single procedure for making an application for any variation of a permission – whether major or minor – which can be dealt with by the planning authority appropriately, in light of its assessment of the materiality of the proposed amendment.

We envisage that the authority would be able to choose to permit either:

(1) **both the original proposal and a revised version, with the applicant able to implement either; or**

(2) **only the revised version, which would thus supersede the original.**

Do consultees agree?

Number of responses

8.382 Total: 45 (5 strongly in agreement, 25 in agreement subject to conditions, 4 equivocal responses, and 11 in disagreement).

Responses strongly in agreement

8.383 *Douglas Hughes Architects Ltd.:* We strongly support a precise procedure in order to vary a planning permission. At present this is extremely complicated and is interpreted by differently across LPAs.

8.384 *Theatres Trust:* The Trust agrees with this proposal, which would appear to simplify for applicants the procedure for seeking amendments.

8.385 *National Trust:* Support proposal which brings together procedures for amendments to existing planning permissions would help to simplify what is quite a complex mix of procedures at the present time.

8.386 *Huw Evans:* The bringing together of procedures for amendments to existing planning permissions would help to simplify what is quite a complex mix of procedures at the present time.

8.387 *Natural Resources Wales:* Subject to imposition of procedures that define which proposal has been implemented, we welcome this proposal.

Responses in agreement (without further comment)

8.388 Institution of Civil Engineers Wales, CLA, Monmouth Town Council, PINS, Newtown and Llanllwchaiarn Town Council, Keith Bush

Responses in agreement (with additional comment)

8.389 *PEBA:* Yes – we think that the developer should be able to decide whether to implement the revised planning permission. However, the developer having decided to do so, it is reasonable and would benefit development management if the effect were that the original planning permission then fell away. In any event, there needs to be a way of deciding whether the applicant has "implemented" the new planning permission, because otherwise it is not clear which permission governs the development.

8.390 *POSW, Monmouthshire CC, Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, Ceredigion CC, Rhondda Cynon Taf CBC:* Agree Option 2 would be most appropriate and provide clarity to developers and LPA's. With option (1) this could result in difficult enforcement issues, what would happen if they implement part of original and part of revision?

8.391 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes, in principle and it is felt that (2) is preferable in that it gives clarity to both the local planning authorities and developers. Can we discuss – an applicant may want option (1)?

8.392 *Andrew Ferguson:* Procedure under S73 and 96A to be brought together – this approach is welcomed but further guidance on neighbour notification etc would be required (along with clarification on whether new S106 agreements are required for all (as they wouldn't be for S96A applications). Further clarification on this process should also be required – i.e what would the description of development be if a minor amendment is sought…the original and then clarification? There are already issues in terms of how S73 works in practice and including S96a (whilst logical in some respects) may have other consequences not envisioned. Some of these issues are highlighted in the answer below.

8.393 *Allan Archer:* The proposal to bring together these existing procedures into a single procedure is welcome. However, I think that the provisions of the primary legislation need to provide sufficient clarity on the categories to reduce the potential for challenges. Concerning para 8.157, I wonder if the consequence of s71ZA, which then allows an application to apply to substitute different plans under s73, was an unintended consequence which should be reconsidered.

8.394 *Newport City Council:* Yes, but need clarification if it is a new permission. There is a third scenario which is a mixture of both which should be discouraged.

8.395 *The Law Society & Huw Williams (Geldards):* We agree that this is a welcome proposal to restate the provisions on variation in a single, coherent, provision. Allowing the authority to categorise variation applications will give rise to disputes. As a decision to classify a variation application as a major change will, in many cases, have significant cost implications for the applicant. We therefore suggest that the quick appeal model in sections 62ZA-62ZD could also be applied to disputes on the categorisation of variation applications.

8.396 *Neath Port Talbot CBC:* Option (2) would be most appropriate and provide clarity to developers and LPA's. With option (1) this could result in difficult enforcement issues or there would need to be a requirement in the legislation that the developer inform the council which planning permission/set of approved plans has been implemented. This is unlikely to occur.

8.397 *Bar Council:* The Bar Council agrees that there is merit in simplifying the current system whereby amendments to planning permissions are addressed under a single statutory provision. With regard to alternatives (1) or (2) as to what the planning authority might be able to grant, the Bar Council considers that this might add unnecessary complexity. The Bar Council understand there is existing well established law which governs the impact of subsequent planning permissions upon implemented or unimplemented permissions which are still extant.

8.398 *RTPI:* This bringing together of procedures for amendments to existing planning permissions would help to simplify what is quite a complex mix of procedures at the present time. However, the provisions of the primary legislation need to provide sufficient clarity on the categories to reduce the potential for misallocations and challenges. Concerning paragraph 8.157, we would question if the consequence of s71ZA, which then allows an application to apply to substitute different plans under s73, was an unintended consequence which should be reconsidered?

8.399 *Bridgend CBC:* Yes to both options for flexibility although it is hard to see any case where we would allow either planning permission to be implemented. If the proposal is to go ahead (i.e. that either could be implemented) the legislation should include a duty on the developer to inform the LPA in writing which one they have implemented.

Equivocal responses

8.400 *Blaenau Gwent CBC:* Whilst the principle of this suggestion makes sense, I am unclear what the legal consequences might be. Although one process might seem sensible, the outcomes of s73 and s96a are different. The former results in a new permission, the latter amends the existing permission. It also raises issues around live decision notices.

8.401 *Pembrey and Burry Port Town Council:* The Committee felt that there would need to be guidance for planning authorities in relation to the term "magnitude" as used in this

recommendation[2] as it was too open to the vagaries of interpretation without it. They were agreed that the process of applying for a variation of a permission would be beneficial provided that there was also provision made for previous consultees on the original application to be re-consulted regarding the amendment.

8.402 *Mineral Products Association:* Paragraph 8.159, makes reference to an existing permission that…is "not fully implemented". We would question where and how this is defined. For a minerals consent, with every shovelful being an individual act of development, logic would suggest that the development is not "fully implemented" until the final piece of restoration has been carried out and the after-care completed. Yet quite clearly, the development will have commenced long before that time. It may be beneficial to consider defining words such as implementation, commencement and completion in order to provide clarity in this area. We would however support bringing together the procedures currently under Sections 73 and 96A as indicated under Question 8-23. However, we feel that any decision made by the authority should be done in agreement with the applicant.

8.403 *Radio Society of Great Britain:* Contrary to what is stated in paragraph 8.156 the current wording of s73 is useful in the particular context of amateur radio. By its nature amateur radio is experimental and may require relatively frequent alterations to particular aerials to obtain the best results. This does not fit at all well with the planning system which is, essentially, designed to deal with 'buildings' which are relatively permanent or altered only infrequently. There needs to be maximum flexibility to allow changes without the need for planning permission or, failing that, to make applications for alterations as easy as possible.

Responses disagreeing

8.404 *POSW South East Wales, Cardiff Council & Caerphilly CBC:* No. The existing process is straightforward, works well, and there is sufficient guidance from Welsh Government to support it. That guidance allows LPAs to consider in each case whether a change to an approved scheme is non-material (s96A), minor material (s73) or major material (new application) and it is part of the development management planner's skill to determine the appropriate category in each case. A s96A approval amends the original permission. A s73 approval is a separate permission, the original permission remains intact and the developer can choose to implement either consent. The adoption of the practice of specifying approved plans in a condition on the consent allows the section 73 process to be used to vary approved plans where a change is material but minor.

8.405 *Merthyr Tudfil CBC:* Disagree. The current separate system works fine.

8.406 *Pembrokeshire CC:* Disagree as the NMA process is a simplified process which allows a developer to have the option to proceed with an amendment or not. A section 73 application is a new planning permission and as such is bound by the application process and assessment in relation to the development plan and relevant considerations. Option (2) would be difficult as an applicant who did not want to

[2] Para 8.11 of the summary, dealing with this question, states that "the precise procedure is determined by the magnitude of the proposed change".

proceed with a revision after more detailed consideration would be faced with having to apply for the original planning permission again.

8.407 *Torfaen CBC:* No. The existing process is adequate.

8.408 *Barratt & David Wilson Homes South Wales:* We disagree with the proposal to merge S73 and S96A applications because a S73 application results in a new planning permission being issued and necessitates the need for a new S106 Agreement to be signed. This allows LPAs to renegotiate any elements of the S106 Agreement. A S96A application does not result in a new planning permission being issued and therefore does not necessitate the need for a new S106 Agreement and greatly reduces the timeframe for approval to be secured. The proposed change also ignores the reason that S96A was introduced, which was to speed up the planning process and S96A has been successful in this regard. The effect of this proposed change will be that non-material amendments will be subject to a longer determination period, thereby increasing the risk associated with development. As confirmed above, increased levels of risk will have a detrimental impact upon housebuilding rates in Wales, which is contrary to the Welsh Government's aspirations. We therefore strongly suggest that the determination of non-material, minor material and major material amendments are undertaken under separate procedures.

8.409 *Home Builders Federation:* The HBF disagrees with the proposal to merge S73 and S96A applications because currently a S73 application results in a new planning permission being issued and often necessitates the need for a new S106 Agreement to be signed. This allows LPAs to renegotiate the S106 Agreement and can cause significant delay. However a S96A application does not result in a new planning permission being issued and therefore does not necessitate the need for a new S106 Agreement, greatly reducing the timeframe for approval to be secured. The proposed change therefore goes against the reason that S96A was introduced, which was to speed up the planning process, which it has achieved.

8.410 The effect of this proposed change will be that non-material amendments will be subject to a longer determination period, thereby increasing the risk associated with development. Such increased levels of risk will have a detrimental impact upon housebuilding rates in Wales, which is contrary to the Welsh Government's aspirations. We therefore suggest that the determination of non-material, minor material and major material amendments are remain under separate procedures.

8.411 *Redrow Homes:* Redrow does not believe that these procedures should be brought together. A S.73 application will often require a deed of variation and for this matter alone will usually be an 8 week process at best. Redrow would not wish for the 96A benefits (i.e. a quick decision for a nonmaterial change) to be lost.

8.412 *Sirius Planning:* We are concerned that the proposal to bring the mechanism to amend/vary planning permissions together will result in greater uncertainty over how a local authority will process such an application, which will lead to delays. In the current situation, it is initially for the applicant to determine the appropriate route, each of which have their own timing and resource implications. This decision is often already made in consultation with planning authorities.

8.413 *Canal & River Trust:* As an applicant, it is considered that existing arrangements allowing 'nonmaterial' and 'minor material' amendments work well and that it is important to keep a distinction between the two procedures given that they have different timescales for determination, and different requirements for information and consultation.

CONSULTATION QUESTION 8-24.

We provisionally propose that the Planning Code should extend the scope of section 96A (approval of minor amendments) to include approvals of details. Do consultees agree?

Number of responses

8.414 Total: 36 (29 in agreement, and 7 in disagreement).

Responses in agreement (without further comment)

8.415 PEBA, Institution of Civil Engineers Wales, Allan Archer, CLA, POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, Rhondda Cynon Taf CBC, Sirius Planning Canal & River Trust; Huw Williams (Geldards).

Responses in agreement (with additional comment)

8.416 *Pembrokeshire Coast NPA, National Parks Wales:* Agreed. For example colours of materials?

8.417 *Redrow Homes:* Redrow had understood this mechanism already existed under S.96A having already benefited from agreement in such a way with LPA. If it is not already an available mechanism then clarifying its use is supported.

8.418 *Andrew Ferguson:* It is assumed this would only apply if S96 is kept as a separate section in legislation otherwise you could amend and agree details as per a S73 application?

8.419 *RTPI:* We agree that the approval of minor amendments needs to be extended to cover the approval of details i.e. you can amend details already approved under condition, or have more than one set of details approved under the conditions if appropriate.

8.420 *Home Builders Federation:* The HBF supports this proposal, however, consideration may need to be given to a right of appeal against the classification which the Planning Authority choose, rather than an appeal against the decision.

Responses disagreeing

8.421 *Blaenau Gwent CBC, Merthyr Tudfil CBC, Caerphilly CBC, Cardiff Council and POSW South East Wales:* No, the current process works well.

8.422 *Newport City Council:* No should be kept as separate.

CONSULTATION QUESTION 8-25.

We provisionally propose that an expedited procedure should be available for the determination of an application to vary a permission where the implementation of the permitted development is under way. Do consultees agree?

Number of responses

8.423 Total: 41 (18 in agreement, 6 equivocal responses, and 17 in disagreement).

Responses in agreement (without further comment)

8.424 PEBA, Institution of Civil Engineers Wales, CLA, Monmouth Town Council, Theatres Trust, PINS, Home Builders Federation, Keith Bush

Responses in agreement (with additional comment)

8.425 *RTPI:* We agree that an expedited procedure for amendments to approved developments already underway would be a helpful addition and would help encourage the ongoing improvement of developments when the opportunity arises, subject to the payment of an enhanced fee. We question whether a form of this is already in place in LPAs?

8.426 *Bridgend CBC:* Yes – subject to more detail.

8.427 *Newport City Council:* Yes but only for certain types of development due to pressure it would place on authorities.

8.428 *Central Association of Agricultural Valuers:* We agree that such a provision would be of practical assistance.

8.429 *Sirius Planning:* We would support this provision for an expedited procedure to vary permissions where implementation is underway, as this will add flexibility to the current system.

8.430 *Mineral Products Association:* we would agree with the expedited procedure to vary a permission, but do not agree that this should be subject to an enhanced fee.

8.431 *Allan Archer:* I agree that this would be a helpful addition to avoid unnecessary delays in developments under way and, as this may require staff to be diverted from other planning application processing, a suitably enhanced fee should be applied.

8.432 *Accessible Retail:* We support this as it will reduce delay and cost.

8.433 *Pembrey and Burry Port Town Council:* The Committee also agreed to this recommendation provided there was sufficient protection for original consultees in relation to it.

8.434 *National Grid:* The proposal for an expedited procedure to secure a variation to a permission once development is started is welcomed. We believe this recognises the challenges of development, and helps to make Wales an attractive area for investment.

Equivocal responses

8.435 *Andrew Ferguson:* Expedited process once development has started – this would be dependent on the nature of the change surely and the level of consultation required? Clarification is required on up until what point you can seek an amendment to the scheme under S73/ S96A. If NMA process is to remain, clarification is required in terms of the NMA process and whether it can be used to both amend (and discharge) a condition. It would be cheaper to re-discharge a materials condition than to submit a revised NMA/ S73 application. If the description of development is widened (to include LB and CA consent for example etc), this section will need to be carefully worded to explain what it does and doesn't relate to (i.e. will you be able to make minor modifications on LBs without requiring consultation)?

8.436 *Neath Port Talbot CBC:* Mixed opinion. Whilst it could be open to abuse it is understood that developers can often find themselves in a difficult position when implementing consents if issues arise during the development process which could not have been predicted. The current system is not able to respond quickly enough to ensure that risks to developers are contained. It is therefore accepted that procedures should be considered to allow developers to fast track applications in certain circumstances.

8.437 *Canal & River Trust:* As a statutory consultee, it will be important not to erode consultation requirements and timescales within any expedited procedure.

8.438 *Natural Resources Wales:* There are potential resource implications associated with this proposal. Adequate consultation deadlines for statutory consultees should be maintained to enable consultees to respond within a reasonable timescale.

8.439 *The Law Society:* We agree that this is useful proposal that will provide a clear solution for developers when such situations arise. A power to charge an enhanced fee is fair in these circumstances. However, we would point out that given the significantly reduced size of many planning departments even the prospect of an enhanced fee may well not command the planning officer resources required for such an application, so in addition to the ability to charge a statutory enhanced fee a planning authority and a developer should have the option to agree that bringing in independent planner at the developer's cost would be the quickest solution and regulations should allow this flexibility.

8.440 *Huw Williams (Geldards)*: Agree that this is useful proposal that will provide a clear solution for developers when such situations arise. A power to charge an enhanced fee is fair in these circumstances. However, we would point out that given the significantly reduced size of many planning departments even the prospect of an

enhanced fee may well not command the planning officer resources required for such an application, so in addition to the ability to charge a statutory enhanced fee a planning authority and a developer should have the option to agree that bringing in independent planner at the developer's cost would be the quickest solution and regulations should allow this flexibility.

Responses disagreeing

8.441 *POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire Coast NPA, National Parks Wales, Rhondda Cynon Taf CBC:* Disagree, this may be open to abuse and this can already be achieved through the non-material amendment process, as consultation is not required and such applications can be determined within a very short period.

8.442 *Caerphilly CBC, POSW South East Wales & Cardiff Council***:** No; the acceptability of the change will depend upon its material impact, not upon the developers need to have the matter decided quickly. The s96A / s73 process described above was introduced relatively recently and works well.

8.443 *Merthyr Tudfil CBC:* Disagree. We don't have the resources to expedite applications. The provision is there through the non-material amendment route.

8.444 *Blaenau Gwent CBC:* Disagree. LPA's in my experience deal with all applications as quickly as possible in a context of dwindling resources and competing interests. A "fast track" process with an enhanced fee by definition means that other applications will take longer as schemes will queue jump.

8.445 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* No, because this seems to duplicate the existing procedure available using non material amendments.

8.446 *Pembrokeshire CC:* Disagree, this may be open to abuse and this can already be achieved through the non-material amendment process, as consultation is not required and such applications can be determined within a very short period. The NMA process can also be used before, during or after development.

8.447 *Andrew Ferguson:* Expedited procedure open to abuse and encourages people to start and then seek amendment afterwards (or could be seen to be especially if additional fee is paid) – this should be open to same level as scrutiny as currently available.

8.448 *Torfaen CBC:* No, the acceptability of variations and the time taken to fully assess the merits of them will vary. Expediting variations to permissions maybe perceived by the public in a negative light and lead to the transparency and legitimacy of decisions being questioned.

CONSULTATION QUESTION 8-26.

We provisionally propose that the Welsh Ministers should have powers:

1) **to make regulations requiring applications in a particular category to be notified to them, and**

2) **to make a direction requiring a particular application to be so notified, so that they may decide whether to call it in for their decision.**

Do consultees agree?

Number of responses

8.449 Total: 34 (32 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

8.450 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, CLA, POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Home Builders Federation, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, Huw Williams (Geldards), Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

8.451 *Allan Archer:* I agree that the introduction of such regulations would help with the transparency and consistency of the call in process.

8.452 *Caerphilly CBC, Cardiff Council & POSW South East Wales:* Yes, although it is not expected that those powers need to extend any further than the existing ones that Welsh Minsters have.

8.453 *Merthyr Tudfil CBC:* Agreed. A timescale within which they need to respond should be specified.

8.454 *Blaenau Gwent CBC:* The current system seems fit for purpose but given the numbers of applications involved, no objection to this suggestion.

8.455 *Redrow Homes:* In the case of the call-in proposals Redrow believe that procedures should still be applicable to the Welsh Ministers especially in terms of timescales for determination.

8.456 *RTPI:* We agree that the introduction of such regulations would help with the transparency of the call-in process. However the example of developments above a certain size in green belts is a poor example, as there are no green belts in Wales.

Equivocal responses

8.457 *Natural Resources Wales:* We consider that for proposal (2) i.e. making Directions requiring particular applications to be notified, would involve including provision in the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 (as amended) enabling the Welsh Ministers to make directions that it should be formally notified in respect of a particular application. It is unclear what mechanism

would enable Welsh Ministers to become aware of a particular category of planning application in the first instance. We would recommend as an alternative that a similar provision as for 8.26(i) is made i.e. making provisions for Welsh Ministers to be notified for categories of applications would be more appropriate.

CONSULTATION QUESTION 8-27.

We provisionally propose that, where the Welsh Ministers decide to call in an application for planning permission, they (rather than, as at present, the planning authority) should be under a duty to notify the applicant. Do consultees agree?

Number of responses

8.458 Total: 35 (34 in agreement, 1 disagreeing).

Responses in agreement (without further comment)

8.459 PEBA, Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Monmouth Town Council, Pembrokeshire CC, PINS, Home Builders Federation, Newport City Council, Torfaen CBC, The Law Society, Bridgend CBC, Keith Bush, Huw Williams (Geldards), Cardiff Council

Responses in agreement (with additional comment)

8.460 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Ceredigion CC, Rhondda Cynon Taf CBC:* Agreed and welcomed. – this seems obvious and the current situation in complex, and lacks clarity.

8.461 *Allan Archer:* I agree with the proposal which should make the position clearer for the applicant and reduce confusion.

8.462 *Barratt & David Wilson Homes South Wales:* We are supportive of new legislation to improve the transparency of the Welsh Government call-in process.

8.463 *Theatres Trust:* The Trust agrees with this proposal, although we request that it is also stipulated that the Minister must notify statutory consultees, persons that have made representations on the application and persons with an interest in the land.

8.464 *Redrow Homes:* Following on from question 8-26 the Welsh Ministers when notifying the applicant that the application has been called in should set out the process for the determination of the application and timescales for it.

8.465 *Mineral Products Association:* we agree with the duty for Welsh Ministers to notify the applicant when the decide to call in an application. We would, however, suggest that a time limit is placed upon this call-in process, i.e. an application must be called in by Welsh Ministers within 6 weeks of the date an application is validated by the planning authority. This will enable the planning authority to undertake consultations and ensure that the applicant is not left with the prospect of a call in up to the date of determination by committee.

8.466 *Neath Port Talbot CBC:* Agreed and welcomed. – they should also be the subject of the timescales imposed upon the planning authorities.

8.467 *RTPI:* We agree with the proposal. This would provide clarity of the process and who is responsible.

8.468 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Yes, because is it felt that it is correct that the duty to notify results with Welsh Ministers and not the local planning authority. It is their decision and they should notify the applicant.

Responses disagreeing

8.469 *Sirius Planning:* We disagree that the duty to notify should be changed from the planning authority to the Welsh Ministers; there would be less room for error if all communication comes from the council.

CONSULTATION QUESTION 8-28.

We provisionally consider that the following provisions currently in the TCPA 1990 should be not restated in the Planning Bill, but that equivalent provisions be included in the DMP(W)O 2012 if considered necessary:

(1) **section 71(3) (consultation as to caravan sites); and**

(2) **section 71ZB (notification of development before starting, and display of permission whist it is proceeding).**

Do consultees agree?

Number of responses

8.470 Total: 31 (30 in agreement, and 1 other comment).

Responses in agreement (without further comment)

8.471 PEBA, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Monmouth Town Council, Pembrokeshire CC, PINS, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government, Keith Bush, Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with additional comment)

8.472 *Barry Town Council:* Agree, subject to consultation of statutory consultees continuing.

Other comments

8.473 *Mineral Products Association:* Section 71ZB requires an applicant to display a copy of the decision notice (not the permission as referred to in the consultation document) at all times. This in brief is quite simply nonsensical. Minerals consents are not unknown to have multiple paged decision notices. Minerals developments themselves last for many years. Minerals consents routinely are subject to applications to vary conditions as by their very nature they have to deal with changing circumstances throughout their life. It is wholly unreasonable to expect a developer to keep multi paged notices displayed throughout the life of an operation. This section of the legislation should be deleted.

CONSULTATION QUESTION 8-29.

We provisionally propose that the following provisions currently in the TCPA 1990, which appear to be redundant (at least in relation to Wales), should not be restated in the Bill:

(1) **section 56(1) (referring to the initiation of development);**

(2) **in section 70(3), the reference to the Health Services Act 1976 (applications for private hospitals);**

(3) **section 74(1)(b) of the TCPA 1990 (to make provision for the grant of permission for proposals not in accordance with the development plan);**

(4) **section 74(1A) (planning applications being handled by different types of planning authority);**

(5) **section 76 (duty to draw attention to certain provisions for the benefit of disabled people); and**

(6) **section 332 (power of Welsh Ministers to direct that planning applications should also be treated as applications under other legislation).**

Do consultees agree?

Number of responses

8.474 Total: 30 (30 in agreement).

Responses in agreement (without further comment)

8.475 Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, PINS, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI,

Bridgend CBC, Lawyers in Local Government, Keith Bush, Huw Williams (Geldards), Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with further comment)

8.476 *PEBA:* Generally yes. We do however consider there to be a practical need for a provision which fulfils the function of section 56 of the TCPA 1990; and enables the developer and the local planning authority to judge against a stated set of principles whether the development authorised by the planning permission has been begun.

CHAPTER 8: GENERAL COMMENTS

Pre-application procedure

8.477 *CMet Residents Group:* [Pre-application procedure] Whilst the "pre-application service" might iron out early problems for the applicant it is important that the Code states that planning officers must maintain an unbiased view and that they are bound to equally represent the views of members of the local community on which the proposed development will impact. Further the Code states that planning officers must equally be prepared to meet members of the local community to discuss their objections to the application – we note that in our case our local Councillors' request for this facility for our Group was refused.

Applications for small development

8.478 *North and Mid Wales Association of Local Councils:* The Association would welcome a proposal whereby small planning applications are dealt with at Town and Community Council level (perhaps with a planning officer resent). Such applications might include up to 3 houses, division of houses, extensions and minor changes of use.

Environmental impact assessment

8.479 *The Law Society; Huw Williams (Geldards)*: While not disagreeing with the assessment in the Consultation Paper, I would suggest that the architecture of the Code takes account of the prospect of future incorporation within the Code of domestic law equivalent to or in replacement of the current EIA and Habitats regulations.

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Approval by applicants of draft conditions

8.480 *The Law Society:* Agree that making the disclosure of draft conditions mandatory would be problematic. However, I suggest that making requests for draft conditions is a matter for the applicant as this may delay an application coming before the decision-maker. If an applicant thinks that seeing the draft conditions is worth the delay then that should be their prerogative. I would therefore support a power to make regulations to enable an applicant to elect to request draft conditions and to specify a period for comments and a duty on the planning authority to consider the

comments. Five working days should be a sufficient consultation period. I would also suggest a power to limit the right to specific types of development, for example “major developments” as defined in DMPWO. Although not a matter for the Code, it should be noted that if this suggestion was adopted the key performance indicators for planning authorities for determining applications would need to be adjusted.

Split decisions

8.481 *The Law Society:* Split decisions are possible with advert consents and Inspectors are able to issue them for planning permissions, but LPAs cannot. Should be an explicit ability to do so where the elements are clearly severable.

8.482 *Radio Society of Great Britain:* It is noted that there is no reference to the lack of any clear statutory basis for local planning authorities to make what is a termed a ‘split decision’ on the lines of the power for the Secretary of State on appeal in s79(1)(b) of the TCPA Act 1990. The RSGB would very much like to see such a power explicitly granted to LPAs at application stage. The reason is that may radio amateurs have more than one antenna because each one operates on a different frequency band. They would usually make a single application for all the antennas together. It may be that only one of those is objectionable but the whole proposal is refused as a result. The amateur has no option but to re-apply omitting the offending antenna or to appeal. There appears to be no logic in the power to split decisions resting only with the Secretary of State.

8.483 Reasons for decisions

8.484 *The Law Society:* Note the discussion and the provisional view that a duty to give reasons for approval should not be introduced based on the experience in England between 2003 and 2013. Further note that since the consultation started the Supreme Court has handed down judgement in *Dover District Council (Appellant) v CPRE Kent (Respondent) CPRE Kent (Respondent) v China Gateway International Limited (Appellant)* [2017] UKSC 79.

8.485 In my view, there is a case for setting out clearly a duty to give reasons in cases where members of a planning committee decide against officers’ advice to grant permission. This could be expressed simply as a duty to give reasons and for them to be recorded. A regulation-making power to this effect should be considered.

8.486 *Allan Archer:* paras 8.84 and 8.85: I wonder if you might give further consideration to this issue in the light of the recent Supreme Court judgment *Dover District Council v CPRE Kent* [2017] UKSC 79. Granted that the legislative background varies between England and Wales but there are points of principle which could apply to Wales and there is also interesting reference to the common law duty to give reasons. The comments in para 58 of that judgment that “the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong” suggest that some coherent legislative provision would be beneficial.

Conditions relating to biodiversity

8.487 *Association of Local Government Ecologists (Wales):* In relation to the planning conditions tests we would like clarification as to the role that conditions play in in the delivery of mitigation and enhancement especially with regard to biodiversity. Welsh policy including the emerging PPW and existing TAN5 promote enhancement and mitigation, promote building ecosystem resilience and embedding biodiversity throughout decision making at all levels, not just the maintenance of the status quo. This is a particular requirement of the Environment Act and the WFG Act. Planning has traditionally sought to achieve appropriate and relevant improvements via new development (for example new cycle path provision), but biodiversity enhancement (often as set out in the developers ecological report) has in some recent cases been deemed 'unnecessary' by some members of the planning inspectorate (see below examples). This has been discussed at an all Wales level by Local Authority ecologists and with Welsh Government.

Where mitigation and enhancement is relevant to the development and to planning considerations generally, precise, enforceable, supported by policy and reasonable in all other respects it should be capable of being considered necessary to make the development acceptable in planning terms. The interpretation of the tests has recently led to conditions particularly on biodiversity enhancement being removed at appeal, although this has not been consistent across the inspectorate. Making the tests clearer may be helpful to ensure that the requirements of policy and the duties set out in other legislation can actually be delivered via the use of conditions in the planning process.

As biodiversity continues to decline, confirming the presence of species on a site where they should have been is going to become more and more difficult. A negative result being interpreted by the inspectorate as not being relevant to the application will continue to lead to further declines as no opportunities to enhance and readdress previous damage will be able to be taken; this would then fail to meet the requirements of other legislation and national policy. We would wish to see further clarity to ensure that duties and policies (as mentioned previously to form material or relevant considerations) can be taken account of when applying these tests, and to ensure the approach taken in the emerging PPW can be delivered through the use of all relevant planning mechanisms including conditions.

Example appeal decisions:

Appeal Decision APP/E6840/A/17/3168423

"The appellant's ecological survey recorded potential bat roosts but no bats were seen or recorded on site. Nor were any nesting birds found. Notwithstanding these findings the Council require the provision for bat roosts and nesting birds. The Council refer to the Natural Environment and Rural Communities Act 2006 but that has been superseded in Wales by the Environment (Wales) Act 2016. Section 6(1) of that Act states that a public authority 'must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions'. Advice on the proper exercise of those functions in relation to the imposition of

planning conditions is set out in the Circular. The Circular states that conditions may only be properly imposed where they meet the tests, including that they must be necessary. In light of the findings of the ecological survey the requirement in this case cannot, in my view, be said to be necessary in order for the proposed development to proceed.

8.488 *POSW South East Wales, Caerphilly CBC:* the opportunity should be taken to clarify the role of mitigation and enhancement with regard to biodiversity. Welsh statute and policy (notably the Environment Act and the WFG Act) and TAN5, promote enhancement and mitigation, promote building ecosystem resilience and embedding biodiversity throughout decision making at all levels, not just the maintenance of the status quo. Planning has traditionally sought to achieve appropriate and relevant improvements via new development (for example new cycle path provision), but biodiversity enhancement (often as set out in a developer's ecological report) has in some recent cases been deemed 'unnecessary' by The Planning Inspectorate but not in all cases. We, and I understand a number of other LPAs, have experience of wildlife habitat enhancement conditions being struck out at appeal because they do not pass the tests for conditions.

Section 6 of the 2016 Environment Act states: "A public authority must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales, and in so doing promote the resilience of ecosystems, so far as consistent with the proper exercise of those functions." Doesn't that duty make enhancement conditions necessary, relevant to planning, relevant to the development and reasonable, provided they are not onerous, and are enforceable and precise? How does that duty, and similar ones found in the Crime and Disorder Act, the Wellbeing Act, and any other act, compare to the ones in the Listed Building Act such as the need to consider the impact of any development on the setting of an LB when we determine a planning application? We and The Inspectorate accept that last duty and include it in our reports, and may even impose conditions as a result. The LB Act is explicit in that it refers to granting planning permission, whereas the other acts tends to place duties on the Council as a whole, but what effectively is the difference?

This has been discussed at an all Wales level by Local Authority ecologists, and a meeting has been held with Welsh Government. Where mitigation and enhancement is relevant to the development and to planning considerations generally, it should be acceptable to impose the appropriate biodiversity enhancement conditions.

Power to dispose of planning applications

8.489 *POSW, North Wales Development Managers' Group, Monmouthshire County Council*: Reinstate power to dispose of planning applications. The ability to finally dispose of applications was amended in Wales when the DM Procedures Order was amended in 2015 and as such whilst LPAs can finally dispose of applications submitted before that date, they can't do so for those submitted after that date. It would be an efficient use of resources to reinstate the ability to finally dispose of applications.

8.490 *Blaenau Gwent CBC*: Reintroduce a power for LPA's to dispose of applications: It is not uncommon for applications to languish for long periods beyond the stat determination period. The refund provisions have gone some way to reducing the

number but it's still an issue. Applications that are dormant, dead or dying remain undetermined as the LPA's only option at present is to issue a decision. This has a negative impact on the average days PI and/or introduces a right of appeal to a case that was long since abandoned by the applicant. In cases such as this, the LPA should have the power to remove the application from the register as "disposed of".

8.491 *Ceredigion County Council:* Power to dispose of planning application to be included; and Power to address longstanding extant permissions; concerns regarding extant permissions

8.492 *Neath Port Talbot CBC:* Reinstate power to dispose of planning applications. The ability to finally dispose of applications was amended in Wales when the DM Procedures Order was amended in 2015 and as such whilst LPAs can finally dispose of applications submitted before that date, they can't do so for those submitted after that date. It would be good to reinstate the powers for LPAs to finally dispose of applications that are lying dormant without progress being made by the applicants/agents.

Short permissions

8.493 *Ceredigion County Council:* General power for short consents, to be accompanied by general power for short completions (Inspector recognised the particular circumstances of rural Ceredigion in the Ceredigion LDP Examination report)

Completion notices

8.494 *Planning Inspectorate (PINS):* The Inspectorate also suggests that one matter has been overlooked: Section 94 and 95 of the TCPA 1990 refer to Completion Notices, which could usefully be reviewed. Though it is not known how much LPAs use these provisions, appeals in this respect are rare and do not appear to serve much of a practical purpose. On appeal, Completion Notices are unlikely to lead to any significant change in progressing development. Such situations are an issue, and maybe worthwhile in reviewing.

Matters to be considered

8.495 *Community Housing Cymru:* Rural Housing Delivery: We would also urge that rural delivery of housing be considered, since the challenges are very different in rural and urban communities. Our members have indicated that rural schemes face barriers such as the lack of SME builders, the self-build route being more attractive and large schemes tending to be inappropriate in rural communities. Registered Social Landlords (RSLs) also find that Section 106s make schemes unattractive and limit flexibility in development.

8.496 *Community Housing Cymru:* We would consider that Section 106s should be deemed unnecessary for RSLs, especially on exemption sites, as this would allow them to be more flexible in rural areas. We would also welcome the encouragement of cooperative housing, and propose that planning law reflect this pathway as one way of delivering affordable housing, as well as wider social benefits.

8.497 *Theatres Trust:* The Trust's overall objective from this consultation is to ensure the final Bill provides the framework to ensure any subsequent amendments to legislation and planning policy promotes and protects culture and the arts within Wales as a priority. The Trust believes culture should be more fully reflected in planning policy, decision making and planning outcomes throughout Wales than is presently the case. Culture gives communities a sense of identity, promotes inclusion, and is essential to our health and well-being. The Trust strongly recommends that Ministers ensure culture and the arts form a key component of planning policy in Wales. This will ensure the promotion and protection of arts and culture as a priority in local planning and decision making to benefit communities throughout Wales.

8.498 *RTPI Cymru:* Another important point is the relative uniqueness of Planning Law. Paragraph 1.51 states "Planning is the epitome of public consultation. Whatever problems may arise in practice ... there is a determination to include the public in the process in a way which is unmatched in other regulatory systems." We would suggest that this be considered when identifying the considerations set out in Paragraph 5.120, along with the support for community engagement that goes beyond consultation.

Chapter 9: Applications to the Welsh Ministers

CONSULTATION QUESTION 9-1.

We provisionally propose that sections 62M to 62O TCPA 1990, enabling a planning application to be made directly to the Welsh Ministers in the area of an underperforming planning authority, should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8. Do consultees agree?

Number of responses

9.1 Total: 33 (10 in agreement, 6 in agreement subject to conditions and 17 in disagreement).

Responses in agreement (without further comment)

9.2 Institution of Civil Engineers Wales; CLA; Home Builders Federation; Keith Bush; PEBA; Bridgend County Borough Council

Responses in agreement (with additional comment)

9.3 *Allan Archer:* Given that this is recent Planning (Wales) Act 2015 legislation not yet brought fully into effect and that there is therefore no experience of this legislation in practice, it seems completely reasonable to propose that it be restated in the proposed Code as proposed

9.4 *National Grid:* We agree that the relatively recent origin of the powers discussed is an important factor. The proposal to make no change as a result makes good sense.

9.5 *Sirius Planning:* We would support the provision to allow applications to be submitted directly to Welsh Ministers, in the case of underperforming authorities, if it would speed up the determination of applications.

9.6 *The Law Society:* We agree but suggest that there is a clear separation of the provision relating to under-performing planning authorities, which are exceptional, and the determination of nationally significant schemes. As determinations by Welsh Ministers in areas of underperforming authorities are not yet operation and therefore not yet tried and tested, it is logical to carry forward these provisions unchanged.

Responses in agreement (subject to conditions)

9.7 *Barry Town Council:* Agree, but would consider that if a planning authority is underperforming then this should be addressed.

9.8 *Blaenau Gwent CBC:* Agree but there must be clarity around what an underperforming LPA is.

9.9 *Theatres Trust:* The Trust agrees with this retention in principle, but we would advocate Welsh Ministers working with 'underperforming' planning authorities to

resolve any perceived shortcomings as quickly as possible so as to ensure decision-making is subject to proper local accountability and knowledge.

9.10 *RTPI:* Given that this is recent Planning (Wales) Act 2015 legislation not yet brought fully into effect and that there is therefore no experience of this legislation in practice, it seems reasonable to propose that it be restated in the proposed Code as proposed. However further consideration needs to be given to the detail of such a proposal. RTPI Cymru believes that where an authority is deemed to be poorly performing, the areas of poor performance and the root causes of the poor performance need to be established and then an appropriate response should be developed and implemented. The option to make applications direct to Welsh Ministers should be an option of last resort.

9.11 *Huw Williams (Geldards):* Agree, but suggest that there is a clear separation of the provision relating to underperforming planning authorities (which are exceptional and penal measures) and the determination of nationally significant schemes.

9.12 *Rhondda Cynon Taf CBC:* Yes provided they are implemented by the Welsh Ministers as at present it is noted that no secondary legislation has been produced to bring them into effect.

Responses disagreeing

9.13 *Pembrokeshire Coast NPA & National Parks Wales:* Disagree. This really hasn't been thought through sufficiently. The call in process could adequately be used for this purpose, whereby the applicant could request the application be called in once it has been submitted to the Authority rather than submitting to the WG.

Land charges departments etc. may be unaware of such applications and the Authority may fail to be able to provide all information relating to land for land charges queries etc.

9.14 *Caerphilly CBC, POSW South East Wales & Cardiff Council:* No. This undermines the democratic aspect of the development management system. As well as the threat of an appeal against non-determination, LPAs now have to return fees if they do not determine an application within an agreed period. That should be adequate sanction to encourage LPAs to perform efficiently.

9.15 *POSW & Monmouthshire CC, Ceredigion CC:* Disagree. This doesn't appear to have been thought through sufficiently. Similarly to appeals, often conditions put on will be required to be discharged, enforced by lpa in the longer term. The systems need to be in place for the long term logging of all applications therefore these need to be logged by the original planning application. Has the WG ever used this power? Seen as a stick, but really not a sufficiently robust way to actually sort out any underperforming Authority in any event – it needs to be eliminated as a way forward and the appeal process used instead. The call in process could adequately be used for this purpose, whereby the applicant could request the application be called in once it has been submitted to the Authority rather than submitting to the WG. Land charges departments etc. may be unaware of such applications and the Authority may fail to be able to provide all information relating to land for land charges queries etc

9.16 *Merthyr Tudfil CBC:* Disagree. Unnecessary, applicant can request call-in.

9.17 *Carmarthenshire CC:* Disagree. The call in process could adequately be used for this purpose, whereby the applicant could request the application be called in once it has been submitted to the Authority rather than submitting to the WG. Land charges departments etc. may be unaware of such applications and the Authority may fail to be able to provide all information relating to land for land charges queries etc. Similarly to appeals, often conditions put on will be required to be discharged, enforced by LPA in the longer term

9.18 *Flintshire, Denbighshire,* Gwynedd *and Ynys Mon Council Legal Services; Lawyers in Local Government:* No, because it is felt more appropriate to follow a call in process.

9.19 *Andrew Ferguson:* I still don't consider that the option to bypass the LPA is the correct approach to "improve" an underperforming Local Planning Authority. Taking applications away from LPAs and removing the fees that go with them will result in less skills and increasing pressure on authorities. In addition, given the time taken to consider called in appeals etc, it is not considered that WG taking on this role will actually improve the situation or reduce the overall timeframe. This is taking decision making responsibility away from the local authorities but these points have been raised before and ignored.

9.20 *Pembrokeshire CC:* Disagree. Applicants have the option to appeal on the grounds of non-determination. Although the procedure is available under the 2015 Act, there appears to be little or no evidence to suggest that this procedure is necessary or desirable.

9.21 *Neath Port Talbot CBC:* Disagree. This is considered to be a stick, but is not a sufficiently robust way to actually sort out any underperforming Authority in any event – it needs to be eliminated as a way forward and the appeal process used instead.

9.22 *Newport City Council, Torfaen County Borough Council:* No. This undermines the democratic aspect of the development management system. As well as the threat of an appeal against non-determination, LPAs now have to return fees if they do not determine an application within an agreed period. That should be adequate sanction to encourage LPAs to perform efficiently.

CONSULTATION QUESTION 9-2.

We provisionally consider that the law relating to pre-application consultation and pre-application services in connection with developments of national significance should be reviewed and, where appropriate, clarified. Do consultees agree?

Number of responses

9.23 Total: 32 (29 in agreement, 3 equivocal comments).

Responses in agreement (without further comment)

9.24 Institution of Civil Engineers Wales; Caerphilly CBC, POSW South East Wales & Cardiff Council; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Pembrokeshire CC; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CC; Lawyers in Local Government; Keith Bush; PEBA; Huw Williams (Geldards); Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Service

Responses in agreement (with additional comment)

9.25 *Pembrokeshire Coast NPA, National Parks Wales, Ceredigion CC, Carmarthenshire CC, POSW & Monmouthshire CC*: Agreed. Needs simplifying and made less expensive.

9.26 *Allan Archer; RTPI*: The consultation paper seems to have reasonably identified this area as one where there may be a case for clarification and the proposal for review and, where appropriate, clarification and minor amendments of the law seems reasonable.

9.27 *Health & Safety Executive*: Whilst HSE supports the proposal in principle, this is on the assumption that any review of pre-application consultation will not reduce or remove the requirement to consult, where appropriate, with HSE as a 'specified person', including, when applicable, with regards to secondary consents.

9.28 *PINS*: The proposal to review and clarify the capacity to provide pre-application services for DNS is welcomed and would support the provision of advice on secondary consents by statutory consultees, or by PINS if technical capacity is increased over time.

9.29 *Bridgend CBC*: Yes – However, clarification is needed regarding which body will determine secondary consents.

9.30 *Rhondda Cynon Taf CBC:* It is agreed that the clarification of the law would be sensible it being one of the purposes of the Code to clarify and make clear the law where possible.

9.31 *Planning Aid Wales*: PAW would be pleased to be involved in any future review of pre-application services in relation to DNS (and/or Major development applications to Planning Authorities).

Other comments

9.32 *SP Energy Networks*: SP Energy Networks specifically agrees to a review of the pre-application consultation procedures between NSIPs and DNSs. SP Energy Networks' view is that these procedures should be closer to the NSIP process than the relatively more prescriptive DNSs process.

9.33 *Natural Resources Wales*: We would welcome opportunity for further engagement in any review of the pre-application stage for the consenting process for Developments of National Significance. If the review relates to the entire aspect of statutory pre-application consultation, we suggest that for reasons of consistency, this review

should extend to the equivalent stage for the consenting process for Major Development.

CONSULTATION QUESTION 9-3.

We provisionally propose that the power to appoint assessors to assist inspectors to determine DNS applications that are the subject of inquiries or hearings should be extended to allow their appointment in connection with applications determined on the basis of written representations. Do consultees agree?

Number of responses

9.34 Total: 29 (29 in agreement).

Responses in agreement (without further comment)

9.35 Institution of Civil Engineers Wales; Caerphilly CBC, POSW South East Wales; Cardiff Council; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; Newport CC; Torfaen CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA

Responses in agreement (with additional comment)

9.36 *Pembrokeshire Coast NPA & National Parks Wales:* Agreed, this really is a matter of detail for the Inspectors dealing with DNS applications and the type of application should not be a determining factor.

9.37 *Allan Archer:* I agree with this proposal which seems reasonable and sensible.

9.38 *POSW & Monmouthshire CC, Carmarthenshire CC, Ceredigion CC:* Agreed, this really is a matter of detail for the Inspectors dealing with DNS applications and the type of application should not be a determining factor.

9.39 *PINS* Assessors could be as helpful in dealing quickly and correctly with matters raised in written representations as they would be during inquiries/hearings. Their appointment in connection with written representations should therefore be permitted.

9.40 *Sirius Planning:* We would support the provision to allow appointment of assessors to assist Inspectors determining DNS applications, if it would speed up the determination of applications.

9.41 *The Law Society:* We agree with the proposal but suggest persons appointed are termed “Experts” or Expert Advisors” (which would avoid conflict with use of the title “assessor” as we suggest in our response to Q5-11). DNS applications determined by written representations are should not be taken to be less complex than those following the hearing or inquiry procedure. By its very nature, DNS work would benefit from assessors. This would also ensure consistency.

9.42 *RTPI:* This appears a reasonable proposal and we raise no objections

9.43 *Huw Williams (Geldards)*: See response to question 5-1 1. Agree with the proposal but suggest persons appointed are termed "Experts" or Expert Advisors".

9.44 *Rhondda Cynon Taf CBC:* Again there is no objection to this proposal. It seems a reasonable and practical suggestion.

CONSULTATION QUESTION 9-4.

We provisionally propose that sections 62D to 62L of the TCPA 1990 (DNS procedure) should be restated in the new Planning Code, subject to appropriate adjustments to reflect our proposals in Chapters 7 and 8. Do consultees agree?

Number of responses

9.45 Total: 28 (27 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

9.46 Institution of Civil Engineers Wales; Caerphilly CBC, POSW South East Wales; Cardiff Council; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; Newport CC; Torfaen CBC; Neath Port Talbot; Bridgend CBC; Keith Bush; PEBA; Huw Williams (Geldards)

Responses in agreement (with additional comment)

9.47 *Pembrokeshire Coast NPA & National Parks Wales*: Agreed, unless specified above.

9.48 *Allan Archer*: Given that this is very recent legislation and that there has been no widespread experience as yet of its operation, It is reasonable to propose that it be restated in the new Planning Code subject to any consequential changes arising from other proposed changes as may be finally agreed.

9.49 *POSW & Monmouthshire CC*: Agreed, unless specified above.

9.50 *National Grid:* We agree that the relatively recent origin of the powers discussed is an important factor. The proposal to make no change as a result makes good sense.

9.51 *The Law Society:* We agree. Given the responses above, sections 62D-L of the TCPA should be broadly restated.

9.52 *RTPI:* Given that this is very recent legislation and that there has been no widespread experience as yet of its operation, It is reasonable to propose that it be restated in the new Planning Code subject to any consequential changes arising from other proposed changes as may be finally agreed.

9.53 *Rhondda Cynon Taf CBC:* Yes 62D to L deals with referrals of developments of national significance to the Welsh Ministers. If these requirements are to remain then they should be set out in the new Code.

Equivocal responses

9.54 *PINS:* Yes, although it is not clear exactly how proposals would alter the DNS application procedure. As the DNS system is a unique procedure, any changes in relation to the application process would have to be carefully considered, given the strict timetable (36 weeks) for a decision to be issued. Any changes to the application stage could cause delays, and any change would take time & resource to implement. It is also worth noting the position of Welsh Government, and the Wales Act 2017, and the provisions to be brought in via secondary legislation relating to the consenting of some energy projects up to 350MW. Any change to the DNS system would need to be considered with this in mind, as both legislatives changes would need to work together.

CONSULTATION QUESTION 9-5.

We provisionally propose that section 101 of and Schedule 8 to the TCPA 1990 (planning inquiry commissions) should not be restated in the new Planning Code. Do consultees agree?

Number of responses

9.55 Total: 29 (29 in agreement).

Responses in agreement (without further comment)

9.56 Institution of Civil Engineers Wales; Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC, POSW South East Wales; Cardiff Council; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; POSW; Monmouthshire CC; Newport CC; Torfaen CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Huw Williams (Geldards)

Responses in agreement (with additional comment)

9.57 *Allan Archer & RTPI*: The consultation paper sets out a convincing case that this legislative provision should not be restated.

9.58 *PINS*: As DNS applications are now being submitted and decided s101 and schedule 8 are even less likely to be implemented and should not be pursued in the Planning Code.

9.59 *National Grid*: The proposal to abolish planning inquiry commissions makes sense, and fits in well with the philosophy of planning simplification.

9.60 *The Law Society*: We agree. Planning Inquiry Commissions, as a concept was never progressed and appears to be a historical leftover. Thus no reference should be included in

9.61 *Rhondda Cynon Taf CBC:* Yes as they are not required. There is no point in including any obsolete provisions in the Code.

9.62 *Pembrey and Burry Port TC:* The Committee saw no reason to maintain these unused procedures.

CHAPTER 9: GENERAL COMMENTS

9.63 *SP Energy Networks:* SP Energy Networks are of the view that the Planning Act 2008 has not been given due consideration in drafting of the consultation. It is noted that the matters addressed in Chapter 9 do not deal with a common problem in national significant infrastructure project in Wales, the concept of Associated Development. The consultation questions jump from Q9.1 on underperforming planning authorities to Q9.2 to pre-application consultations in NSIPs and DNSs. There is a demonstrable need to clarify the application of AD in Wales – in response to which SP Energy Networks would very much support such clarification in a reformed Planning (Wales) Bill. It is suggested that reference is made in Chapter 9 to acknowledging associated infrastructure development works should, unless where a promoter holds rights to carry out such works, be consented as part of a main infrastructure development in the DNS or NSIP regime.

It is noted in Para 9.31 that further reform will be necessary due to changes to recently devolved powers in matters of energy development. SP Energy Networks would welcome the opportunity to be involved in these changes, in particular, the transferral of s37 consenting procedures from the Electricity Act 1989 to the Welsh Assembly as set out in the Wales Act 2017, and on which SP Energy Networks is actively engaging with Welsh Assembly representatives to develop an appropriate consenting process which reflects s37 and the requirements of the Planning (Wales) Act 2015.

9.64 *Tidal Lagoon Power:* Paragraphs 9.12 – 9.14 which refer to Planning Act 2008 and infrastructure consenting does not recognise the limitations of application in Wales. Nationally Significant Infrastructure Projects in Wales have always been subject to difficulties because 'associated development' could not be included within a Development Consent Order, similarly 'associated consents'. The matter of 'associated development' is resolved through the Wales Act 2017. 'Associated consents' are not entirely resolved, particularly for coastal or offshore projects – notably energy or port NSIPs which require a marine (works) licence. A marine (works) licence is largely a duplication of a DCO, hence why in England the outcome would be a 'deemed' marine licence; yet in Wales it is an entirely separate process with no statutory timescales nor a process to address 'non-determination' (i.e. 'non-determination' as we recognise it under TCPA).

Similarly, paragraph 9.15 (and 9.23) does not recognise difficulties for decision-making and managing development when an energy DNS is part onshore/offshore (including the limitation to the scope 'connected consents'). Although paragraph 9.30 recognises that the DNS system is still in its infancy, there is already a case example where this proved problematic. Further devolution relating to energy and ports under the Wales Act 2017 will put greater pressure on the need for a solution as DNS scales up and inevitably expands. There's also the question of how DNS needs to responsive to future infrastructure, the funding, financing and value creation challenges of delivering infrastructure could mean, for example energy or transport needing to come forward as mixed-use/multifunctional and what provisions may be

required to enable this. Paragraph 9.31 does recognise the likely evolution of DNS, but does not recognise that this is imminent and requires consideration now.

I believe it would be a missed opportunity not to give more attention to the issues arising with Development of National Significance (under Planning Act (Wales) 2015) and Nationally Significant Infrastructure Projects (under Planning Act 2008) – why let problems bed in if there are ready solutions or solutions that could be implemented to avoid problems? If lack of consultation reaction at the scoping stage on infrastructure planning was the issue, perhaps the Law Commission alongside the Welsh Government could consider a focus group approach to stimulate and capture a response from experts on infrastructure planning in Wales (across sectors – to include PINS/WG/LAs, developers, consultants, lawyers, industry representatives). Some solutions may be policy related (and could be considered now in relation to the development of the National Development Framework and next revision of Planning Policy Wales – for instance to date, PPW and the development plans are largely silent on NSIPs despite being 'relevant matters' capable of influencing decision making), on the other hand, some solution may require a legislative fix in which case now is the time to consider this, unless there is appetite for subsequent planning Bills to specifically address infrastructure in Wales.

It would be a missed opportunity not to consider how the planning system in Wales could be future-proofed, not only in anticipation of how development management pressures are evolving and will be different in future, but also in recognition of the shift in thinking required to address the process of undertaking sustainable development (in other words, the Five Ways of Working under the Wellbeing of Future Generations Act) in order to achieve the Wellbeing Goals/sustainable development outcomes in Wales. The planning system of the near future almost certainly needs to be able to deal with development that is far more integrated and multifunctional.

Tidal lagoons also provide an insight into how future infrastructure projects (transport and energy projects especially, both NSIPs and DNS) will be developed in a much more integrated and multifunctional way yet legislation places restrictions on this integration, thus a restriction on the ability to undertake the process of sustainable development, and in turn on the sustainable development outcomes that the planning system aims to encourage.

The house building sector is also seeing changes and innovation in response to the significant challenges of supply, sustainability and affordability; we already know that innovative housing projects require regulatory flexibility or changes. In the case of custom-build housing, following a review in England the Self-build and Custom Housebuilding Bill was introduced to address planning barriers (legislation that extends to Wales though not brought into force - according to House of Commons Library Briefing Paper Number 06784, 1 March 2017), though this is yet to receive much attention in Wales despite active interest by developers and pressing housing supply needs.

The interaction between the land use planning system in Wales and the relatively new marine planning system raises opportunities as much as it does challenges. Wales is a largely coastal country, with most of the population, and much of the growth and development focus in the coastal belt. The maritime economy (including

ports, energy, recreation etc.) is seen as vital to Wales' future as reflected in the first (draft) Welsh National Marine Plan. Aside from policy consistency and integration challenges, the regulatory overlaps between marine licensing and land use planning at the coast is a matter that should be reviewed and considered if the brief is to review how to gain clarity, reduce complexity and duplication of controls on development in Wales. If the Welsh Government is now also looking at introducing new legislation on marine management/marine licensing (as Scotland did), then a parallel review of the land use planning system in Wales provides a great opportunity to address the interface issues between land use, marine and infrastructure planning.

To conclude, there is a need for further consideration of infrastructure planning in Wales, and on how to future proof the system, particularly to avoid a Bill coming forward that simply deals with legacy/past problem, and does not build on the positive planning platform provided by the Planning (Wales) Act 2015. WG should consider, with the Law Commission's input, how to avoid problems in a growing/evolving planning system in Wales as well as fix the longstanding issues.

9.65 *Innogy Renewables UK:* In terms of future consenting arrangements in Wales, the Law Commission should also consider projects devolved to the Welsh Ministers under the Wales Act 2017 (including electricity generating stations 50350MW and certain overhead grid connections up to 132kV). Devolution powers for these projects come into force on 1 April 2019 and the Welsh Government is currently working on proposals to implement these new powers; Innogy is of the view that any future consenting regimes should avoid too many tiers. Consideration should also be given to how the legislation will deal with the inclusion of compulsory acquisition rights as part of any consenting process for major infrastructure projects, as is currently available to developers under the Electricity Act 1989 and the Planning Act 2008.

Chapter 10: The provision of infrastructure and other improvements

CONSULTATION QUESTION 10-1.

We provisionally consider that the statutory provisions relating to CIL, currently in Part 11 of the Planning Act 2008 as amended by the Localism Act 2011, should be incorporated broadly as they stand into the Planning Code, pending any more thoroughgoing review that may take place in due course. Do consultees agree?

Number of responses

10.1 Total: 34 (30 in agreement, and 4 equivocal responses).

Responses in agreement (without further comment)

10.2 Institution of Civil Engineers Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Home Builders Federation; Neath Port Talbot CC; Lawyers in Local Government; Keith Bush; PEBA

Responses in agreement (with added comment)

10.3 *Presteigne & Norton Town Council*: the imminent passing of control of infrastructure funding/Community Infrastructure Levy to Welsh Government was felt to be a good thing and the Town Council would like to see this being made more formal so that it could be introduced uniformly throughout Wales. At present our unitary authority does not have any formal policy on CIL although one is under consideration in the LDP currently in production.

10.4 *Llandysilio Community Council and Llandrinio & Arddleen Community Council*: [We] welcome the introduction of the Community Infrastructure Levy which will help improve the infrastructure and facilities of our communities. Due to the absence of a Local development Plan in Powys we have received many speculative applications in the last 12 months and wish that the C.I.L could have been introduced earlier.

10.5 *Caerphilly CBC, POSW South East Wales; Cardiff Council; Torfaen CBC*: Yes, but that thoroughgoing review can't come soon enough. The system is overcomplicated and inflexible.

10.6 *Carmarthenshire CC*: Agree. Acknowledge that CIL will be reconsidered in its entirety by WG in due course. Cannot have a vacuum in the meantime – particularly re LPAs that have already adopted CIL.

10.7 *Theatres Trust*: The Trust agrees with this proposal so as not to pre-empt the Welsh Government review of CIL in Wales, to which the Trust would also be keen to provide comment.

10.8 *PINS*: Yes. There has been little interest in CIL in Wales, possibly by reason of its largely rural nature. The adaptation of the existing CIL, or development of an alternative, which would be more attractive to Welsh authorities could be addressed by a CIL review. In the meantime it is necessary for the existing CIL statutory provisions to be retained.

10.9 *National Trust*: Support the way forward and the role of CIL to ensure appropriate funding is available to support good place making.

10.10 *Newport CC*: Agree that the statutory provisions relating to CIL should be incorporated in the Planning Code. However we would welcome the opportunity to part-take in a thorough review in Wales. Whereas the principle of a levy could work, the mechanisms of how it currently works needs further investigation, particularly the lengthy administrative processes associated with it and the fact it effectively exempts significant brownfield schemes (with existing floor space) from paying, which potentially could discourage LPAs from developing brownfield strategies.

10.11 *National Grid*: The suggestion that the Welsh Government should be able to review the operation of the Community Infrastructure Levy once it is within the competence of the Assembly makes sense and is supported.

10.12 *The Law Society*; *Huw Williams (Geldards)*: Agree. This will create space within the architecture of the Code for the Community Infrastructure Levy to be amended and adapted to meet Welsh circumstances.

10.13 *Rhondda Cynon Taf CBC*: It is considered that the CIL provisions as currently set down in Part 11 of the Planning Act 2008 (as amended) should be incorporated into the Code. However, the Council would welcome Welsh Government undertaking a wider review of the operation of CIL in Wales in the near future.

10.14 *Allan Archer*: I agree with this proposal, in the interests of continuity, and would hope that Welsh Government, do undertake a review as experience suggests that CIL provisions more suited to the circumstances of development and infrastructure in Wales should be developed.

10.15 *RTPI*: While this provision appears sensible, there is a need for a review to be undertaken by Welsh Government, using its new powers as a matter of priority to ensure appropriate funding is available to support good place making.

Equivocal responses

10.16 *Central Association of Agricultural Valuers*: We request that the unique position of agricultural development be considered in any review of CIL provisions. The low value and large area of agricultural buildings, almost never developed for sale and typically imposing little pressure on infrastructure, makes it inappropriate to calculate CIL on an area basis and so they should be exempted from this charge which otherwise frustrates development that is desirable for agricultural productivity or animal welfare. In England, MHCLG is currently considering reports reviewing CIL.

10.17 *Pembrokeshire CC* Agreed but note: A potential disadvantage in some LPAs of adopting a CIL Charging Schedule under the current Regulations (for residential

development) are the implications for the delivery of affordable housing (of which there is often a significant need in more rural LPAs) due to development viability (in areas where the market does not perform so well) potentially becoming more marginal. Whilst the adoption of CIL is not mandatory, the CIL Regs restrict the use of S106 planning obligations in order to encourage authorities to adopt CIL. As a result, the ability to require planning obligations via S106 in the form of financial contributions to infrastructure has reduced (including those authorities who have not adopted CIL, no more than 5 separate planning obligations are able to be used to provide funding for a single specific infrastructure project). This has implications for those obligations which are based on cumulative impact, and require pooled contributions for their delivery.

10.18 *Bridgend CBC*: Yes although would this make it more difficult to repeal CIL if that is the desired course of action?

10.19 *Newtown and Llanllwchaiarn TC*: In part. Town council would like to see a review of CIL schemes and CIL schemes made mandatory for planning authorities, and that CIL is made available to local communities through their town or community councils.

CONSULTATION QUESTION 10-2.

We provisionally propose that provisions relating to planning obligations, currently in sections 106 to 106B of the TCPA 1990, should be incorporated broadly as they stand into the Planning Code, pending any review that may take place in due course. Do consultees agree?

Number of responses

10.20 Total: 32 (27 in agreement and 5 equivocal responses).

Responses in agreement (without further comment)

10.21 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Home Builders Federation; Newport CC; Torfaen CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Neath Port Talbot; Pontarddulais TC

Responses in agreement (with additional comment)

10.22 *Allan Archer*: I agree with this proposal, in the interests of continuity, and would hope that Welsh Government, do undertake a review as suggested in due course.

10.23 *Theatres Trust*: As above, the Trust would agree with this proposal so as not to pre-empt further review.

10.24 *Pembrey and Burry Port TC*: The Committee agreed that incorporating the CIL into proposed Bill would be beneficial, given the likelihood of future reviews of operation by the Welsh Government.

10.25 *RTPI*: We support this, with the above caveat set out in our response to 10.1.

10.26 *Cardiff Council*: Yes. S106 Administrative Costs – The present arrangements do not allow for the inclusion of a fee for the administration of the S106, or allow for fee to be charged where the S106 requires monitoring throughout the development process, with payments/funds released at various stages/pre-agreed times. Larger schemes may be subject to an administrative fee, agreed and set at the beginning of the process but subject to the same tests as the Planning Obligation. Smaller schemes; it will be more difficult to set a fee. It is understood that in England administrative charges can be set using other Legislative provisions. Including the ability for the LPA to set an administrative and/or a monitoring fee where appropriate will assist in a more efficient and effective management of the process.

10.27 *Rhondda Cynon Taf CBC*: Agree, understanding that Welsh Government are also likely to review the working of planning obligations in Wales in the next few years.

Equivocal responses

10.28 *Newtown and Llanllwchaiarn Town Council*: In part. Town council would like to see a review of s106 obligations and brought into a review of CIL schemes generally.

10.29 *Huw Williams (Geldards); the Law Society*: Agree that a comprehensive review of s. 1 06 should be conducted at the same time as a review of CIL. However, I would commend the discussion of s. 106 obligations at paragraphs 5.32 — 5.45 of the IAG Report which refers to largely technical improvements that the Law Society had suggested and which follows similar proposals that had been made to DCLG (as it then was). The proposals were not pursued at the time due to doubts about the extent of the devolved competence of the National Assembly.

CONSULTATION QUESTION 10-3.

We provisionally consider that the rules as to the use of planning obligations, currently in regulation 122 of the CIL Regulations, should be included within the new Planning Bill. Do consultees agree?

Number of responses

10.30 Total: 29 (21 in agreement, and 8 in agreement subject to conditions).

Responses in agreement (without further comment)

10.31 Institution of Civil Engineers Wales; Allan Archer; Country Land and Business Association; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Merthyr Tudfil CBC; Pembrokeshire CC; Home Builders Federation; Newport CC; RTPI; Lawyers in Local Government; Keith Bush; PEBA

Responses in agreement (with additional comment)

10.32 *Theatres Trust*: The Trust supports the retention of these rules, and considers it vital that a framework to maintain obligations on a site-specific basis alongside CIL remains in place.

10.33 *PINS*: Yes. Such an approach would further the aim of consolidation and confirm the statutory nature of the test.

10.34 *The Law Society; Huw Williams (Geldards)*: We agree the rules in regulation 122 should be retained. This correlates with the inclusion of the test for a valid planning condition.

10.35 *Rhondda Cynon Taf CBC*: The statutory three-part test for the use of a planning obligation to enable planning permission to be granted are considered to be of sufficient clarity and importance that they should rightly be contained within primary legislation.

Responses in agreement (subject to conditions)

10.36 *Caerphilly CBC, POSW South East Wales & Cardiff Council*: Yes, but the review referred to above should address the issue of pooling of section 106, the limitations on which should be removed.

10.37 *Association of Local Government Ecologist*: As per planning conditions, we would not wish to see the interpretation of 'necessary' in such tests to become too restrictive and thereby limiting the ability of such agreements to be used to secure improvements or enhancements that are required under policy or other legal duties, especially in relation to biodiversity. Whilst we have no objection per se to the use of the CIL tests we would like to understand how they would be interpreted and used to secure biodiversity enhancement and improvements.

10.38 *Torfaen CBC:* Yes, but the review referred to above should address the issue of pooling of section 106, the limitations on which should be removed. Consideration should also be given to the 5 similar tests in WO Circular 13/97 - either amalgamate them with the 3 tests in Reg.122 or update Circular 13/97.

10.39 *Neath Port Talbot CC*: Agreed, although consideration should be given to allowing Planning Authorities to pool more than 5 contributions under S106 as opposed to being forced to use CIL. This is on the basis that CIL is not always a viable solution across much of Wales (for viability reasons), yet the legislation as it is currently written prevents even small sums of money secured by S106 from being pooled for the benefit of the wider community.

10.40 *Bridgend CBC*: Yes although it would make sense to reconsider the CIL regulations before the rules/tests are embodied in statute.

10.41 *Newtown and Llanllwchaiarn Town Council*: In part. Town council would like to see CIL and s106 obligations made available to communities neighbouring the community where development is taking place, in order to offset the impact on town services of major neighbouring developments.

CONSULTATION QUESTION 10-4.

We provisionally consider that it might be helpful for a provision to be included in the Bill whereby a planning agreement under what is now section 106 of the TCPA 1990 – but not a unilateral undertaking – could include any provision that could be included in an agreement under section 278 of the Highways Act 1980 (execution of highway works), provided that the highway authority is a party to that agreement. Do consultees agree?

Number of responses

10.42 Total: 34 (18 in agreement, 6 equivocal responses and 8 in disagreement).

Responses in agreement (without further comment)

10.43 Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Lawyers in Local Government; Keith Bush; PEBA

Responses in agreement (with additional comment)

10.44 *Allan Archer*: I agree with this proposal on the basis that it potentially avoids having two separate agreements.

10.45 *National Trust*: Support the proposal and to give the option to integrate S278 Highways Act requirement and S106 agreements.

10.46 *Mineral Products Association*: we would agree provision is made to include provisions whereby a planning agreement under S106 could include provisions under S278 of the Highways Act, thereby avoiding duplication and the requirement for both acts to be satisfied separately.

10.47 *The Law Society; Huw Williams (Geldards)*: We agree that this would be a useful provision.

10.48 *RTPI*: It appears sensible to give the option to integrate S278 and S106 agreements if this helps to streamline the process.

10.49 *Bridgend CBC*: Yes – but subject to a caveat that the highways issues are not extensive in scope as that would delay the issue of planning permission.

10.50 *Cardiff Council*: Yes. Issue may arise regarding taking the decision/lead on the progress of such matters. There is the potential for an increased workload for the LPA. May have benefits, but may need wider discussion and explanation with LPAs.

10.51 *Rhondda Cynon Taf CBC*: It is considered this seems a sensible approach and would hopefully reduce duplicity and the need for an applicant/developer to re-submit to an extent the same information in certain cases to both the Planning and Highway service areas of the same Authority.

Equivocal responses

10.52 *Torfaen CBC*: The benefits of such a proposal are recognised e.g. S278s are exempt from CIL pooling restrictions, but highway works are often poorly defined (not stated to be S278 works) in S106's and have to be considered as five types of infrastructure within the pooling restrictions. Needs further consideration though.

10.53 *Barry Town Council*: Concerns were raised that this questions puts doubts in mind whether the Highways Authority are party to such decisions from the start of the planning stage.

10.54 *Glamorgan Gwent Archaeological Trust*: Highways requirements: We note that we see no problem in the proposal in itself, but that there can be issues where works are carried out by the highway authority, under the Highways Act, even in areas where permitted development rights are withdrawn. There is a risk of adverse impact on the historic environment when works occur without consultation.

10.55 *Canal & River Trust*: s106 agreements take time to agree and finalise and including an additional party in the form of the Highway Authority to the agreement could add to the complexity involved unless the planning obligation relates to highway works only. If such a provision is introduced, the option should be left open to have a s106 agreement and a separate s278 agreement and it is understood from paragraphs 10.47-10.49 that this would be the case. Furthermore, if the provision is introduced it should be a choice for the applicant as to whether to utilise it in the event that a Highway Authority is in agreement.

10.56 *Blaenau Gwent CBC*: Firstly, we question the statement that (Nat Park's aside) theLPA and the Highway Authority are always the same organisation. This would not be the case for trunk roads. That said, supportive in principle of the suggestion provided that any changes that remove duplication do not have implications under the Highways Act. Any responsibilities and obligations that would have fallen to the developer under the terms of a 278 must be transferred to the new hybrid agreement. We also need to be mindful of a situation where technical highway requirements prevent the issuing of a planning permission. Question who the enforcer would be.

10.57 *Newtown and Llanllwchaiarn Town Council*: Refer to response 10.1, 10.2, 10.3.

Responses disagreeing

10.58 *Institution of Civil Engineers Wales*: No. S.278 Agreements refer to work done to amend an existing highway in some way. The work may be undertaken adjacent to the site of the planning application, or at some distance away from it. The developer will not normally have any right of access to the land on which the work will be undertaken, other than with the express permission of the Highway Authority, which except in the case of the National Park Authorities, will be the same authority as the Planning Authority, but will neverthelss be a separate legal entity. S.278 Agreements could also include maintenance requirements of the new highway work. For these reasons it would not be appropriate to include them as part of a section 106 agreement.

10.59 *POSW & Monmouthshire County Council*: Disagree with the proposal to merge Section 106s and Section 278 agreements. There was generally a lack of support for this unless Highway works are very straightforward/minimal as any lack of approval by the Highway Authority would delay release of a planning permission.

10.60 *Merthyr Tudfil CBC*: Disagree. This could delay the issuance of PP.

10.61 *Home Builders Federation*: The HBF objects to this proposal as members often currently encounter significant delays with agreeing S278 agreements. If the wording were to allow the choice for the S278 agreement to be included in the S106 agreement to the Planning Authority then this could be used to delay the signing of the S106 agreement. The S278 agreement is also a far more technical approval process so it may add delay to the signing of the S106 whilst technical detail is agreed. The HBF suggest that the current position, where the two separate pieces of legislation are dealt with separately, is acceptable and does not need to be mended as proposed. Current experience would suggest that any more detailed involvement of the highway authority in the S106 agreement is only likely to lead to delays in the issuing of the planning permission.

10.62 *Newport City Council*: No, this involves two different 'Authorities' (the Planning Authority and the Highways Authority) and overly complicates the Planning side of the process. There could be different signatories for the agreements and due to delays in implementing, figures could be out of date.

10.63 *Redrow Homes*: Redrow has experienced significant delays in the gaining S.278 agreements. The ability for a LPA to require this to be linked in with the S106 is of concern to Redrow as it could further delay the frustrating timescales of obtaining planning permissions in Wales. Furthermore a site may require more than one S.278 agreement applicable to further into the development / a future phase and it would be inappropriate to impractical to necessitate the agreement of a S.278 on part of a development that was yet to be designed.

10.64 *Neath Port Talbot CBC*: Disagree with the proposal. As stated at the beginning of this consultation response, complex technical highway details are over complicating the planning process. These agreements should stay out of the planning process as they will further blur responsibilities and result in further delay in the planning process.

CONSULTATION QUESTION 10-5.

We provisionally consider that it would be helpful to make the enforcement of a planning obligation under section 106 of the TCPA 1990 more straightforward by including the breach of such an obligation within the definition of a breach of planning control. We invite the views of consultees, including as to the practicalities of such a proposal.

Number of responses

10.65 Total: 39 (15 in agreement, 20 equivocal responses, and 4 in disagreement).

Responses in agreement (without further comment)

10.66 Merthyr Tudfil CBC; Pembrey and Burry Port Town Council

Responses in agreement (with additional comment)

10.67 *Andrew Ferguson*: Bringing enforcement of a Planning Obligation within the definition of a breach of planning control is welcomed.

10.68 *Pembrokeshire Coast NPA; National Parks Wales; Carmarthenshire CC; Ceredigion CC; Pembrokeshire CC*: Agreed, any remedy for the breach of a planning obligation would be useful.

10.69 *Country Land and Business Association*: Yes provides certainty.

10.70 *Association of Local Government Ecologist*: We would welcome the proposal to make enforcement of S106 agreements more straightforward.

10.71 *Allan Archer*: I support this proposal, in principle, and hope that the additional work needed to think through how this could be made to operate satisfactorily will be able to be proceeded with.

10.72 *POSW; Monmouthshire CC; Caerphilly CBC; POSW South East Wales*: Agreed, any remedy for the breach of a planning obligation would be useful. Make the enforcement of a planning obligation more straightforward by including the breach of such an obligation within the definition of a breach of planning control.

10.73 *Theatres Trust*: The Trust agrees with this proposal. In the case of theatres, typically a Section 106 agreement might require re-provision of a theatre or improvements as a condition of development and a failure to undertake such works can have a detrimental impact on the social and cultural wellbeing of local people. Therefore the strengthening of the ability of planning authorities to enforce such obligations is welcomed.

10.74 *RTPI*: We support this proposal in principle.

10.75 *Neath Port Talbot CBC:* Agreed, the mineral case referred to in the consultation document was in NPT and it demonstrated how the planning system could be abused.

Equivocal responses

10.76 *Institution of Civil Engineers Wales*: Yes. This seems a practical idea. However, in circumstances where the planning obligation requires the payment of a sum of money for some agreed purpose, it is equally important that the Planning Authority be considered to be in breach of Planning control if it has not expended the money received on whatever scheme or item of work the agreement stipulated it was intended for and expended within the validity period of the planning permission.

10.77 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Lawyers in Local Government*: We agree that including a breach of a planning obligation within the definition of a breach of planning control would make things simpler and more

straight-forward. However, enforcing the current arrangements have not been a significant problem in practice and the new arrangements would need legislative provisions to define the scope of what breach of a planning obligation would amount to a breach of control, what would be the grounds of appeal and the remedy for enforcing against such breach.

10.78 *POSW; Monmouthshire CC; Caerphilly BC; POSW South-East Wales*: Agreed, any remedy for the breach of a planning obligation would be useful. Make the enforcement of a planning obligation more straightforward by including the breach of such an obligation within the definition of a breach of planning control.

10.79 *Blaenau Gwent CBC*: Agree that this suggestion needs to be the subject of more detailed consideration but supportive in principle.

10.80 *Planning Aid Wales*: Whilst noting that this is not a central issue for PAW we do have concerns about the extent to which the technicalities of enforcing breach of planning control, including time limits, are appropriate for breach of S106 obligations.

10.81 *PINS*: PINS question whether the intention of the proposal is to change the process of enforcement, and appealing against enforcement notices. At present s.106 can only be appealed to the courts, and this proposal would result in breaches of s.106 being allowed to appeal to PINS (as is the process with appeals against breach of planning control). This would have a significant impact on the work of PINS.

10.82 *Home Builders Federation*: The HBF consider that this would need to be given very careful consideration as often S106 agreements, particularly on larger sites, can be very complicated and involve a range of trigger points. There is a risk that development could be delayed as a result of enforcement action as a result of misunderstanding the precise requirements of the S106.

10.83 *Newport CC*: Concern about watering down the enforcement of planning obligations. Injunctions are a very powerful tool and if such breaches are brought under existing enforcement rules, there is less 'bite'. No real issues with breaches of legal agreements in Newport.

10.84 *Torfaen CBC*: Potentially, although need to give it further thought.

10.85 *The Law Society*: We found differing views on this idea. Some consider that such a far-reaching proposal should await a comprehensive review of the planning obligation system.

The underlying basis of the present system is the principle that positive obligations and particularly financial obligations should only be secured by agreement in advance of a grant of planning permission. Making a planning obligation subject to the enforcement system raises the question of whether a new form of planning condition placing positive obligations on any person implementing a planning permission should be considered. Such conditions would have to be subject to disclosure in draft, but would (unlike planning obligations at present) be capable of being subject to appeal.

An appeal mechanism would probably address one of the most persistent criticisms of the present system namely the delay in negotiation obligations. As suggested by Q10-6 straightforward financial obligations could be secured by a statutory financial charge on the land.

An alternative view expressed notes that developers have become less inclined to meet their financial obligations without follow-up pressure from planning authorities. In most cases this does not extend to enforcement action – but a small number do, and early reform of enforcement would be welcome.

10.86 *Bridgend CBC*: On the face of it, this looks like a straightforward move. Time limits would have to be factored in to the approach and a new enforcement power would be required such as a BCN equivalent for a breach of a S.106. Also, should enforcement action only apply to the covenanter/signatory that has not satisfied a particular requirement/schedule?

10.87 *Canal & River Trust*: It appears to be a far more practical and straightforward solution to include any breach of obligation within the definition of a breach of planning control given that it would make it far easier for the LPA to identify and prosecute. We do however note that it is acknowledged that careful consideration would need to be given to the matters listed in paragraph 10.53 for such a proposal to work satisfactorily. It will be critical for these matters to be carefully thought through prior to the proposal being taken forward.

10.88 *Newtown and Llanllwchaiarn Town Council*: Refer to response 10.1, 10.2, 10.3.

10.89 *Keith Bush*: Agree in principle. There needs to be more consideration about how this would work in practice.

10.90 *Cardiff Council*: Yes, a unified approach would appear sensible. However, a planning enforcement approach may not be appropriate in all cases, particularly in retrieving monies for works or maintenance. Further to the above there could be the potential for over reliance on the diminished resources in many LPAs of Enforcement Teams. Responding to such matters may prove problematic.

10.91 *Rhondda Cynon Taf CBC*: Any change needs to result in an approach which is clear, straightforward and understandable in its requirements and operation. Current arrangements allow for a number of legal approaches depending on the severity and complexity of the breach. As has been acknowledged there would be the need to consider further issues such as time periods for taking action, the issuing of notices and the rights of appeal and it is considered likely that there would still be the need for significant input from Legal colleagues in more certain, more complex cases where a breach is alleged to have occurred. However, matters of specific detail aside at this stage the principle put forward would clearly seem to have merit and is worthy of further consideration.

Responses disagreeing

10.92 *Bar Council*: The Bar Council whilst appreciating the importance of the issues raised with regard to tightening up the response to failures to comply with s.106 planning obligations, considers that there are implicit difficulties of legal principle in putting the

enforcement of breaches of planning control per se on the same footing as failures to comply with covenants within a s.106 agreement or a unilateral obligation. The first is in effect a breach of regulatory law which ultimately can end in prosecution for failure to comply with the enforcement notice and the second is in effect a breach of contract which is governed by civil law remedies (notwithstanding the example provided at 10.51 with regard to alleged fraudulent activity associated with such obligations). To that end, it is the Bar Council's view that the system of enforcement of each should remain separate.

10.93 *Redrow Homes*: Redrow raises concern with this proposal acknowledging that some S106 triggers, especially on larger and/or complex sites, can be missed but usually for practical reason(s). Redrow's experience is that it would be unusual for the complete S106 package not to be delivered by the completion of the development, unless formal agreement has been reached with the LPA not undertake or change certain matters. Redrow would not suggest that S106 obligations are given similar enforcement provisions as with planning permission itself (I.e. enforcement notice, stop notice etc). In relation to S106 payments the deed would typically include financial penalty for late payments and failure to pay at all can be dealt with as prosecution under fraud.

10.94 *PEBA*: While this proposal might be desirable from the point of unifying enforcement procedures, there would be practical issues in that making failure to comply with a section 106 obligation a breach of planning control would presuppose that the person in breach would have a right of appeal. Where an obligation to pay money was concerned, for instance, it would seem undesirable that this could be delayed while the appeal process was pursued. Also, it is a fundamental of an obligation, especially one imposed under an agreement, that it is something voluntarily imposed on the person offering/entering into it. As a result, it would seem to be inconsistent that that obligation could be effectively reneged on by non-compliance and pursuing an appeal afterwards, whereas in the existing situation an applicant for planning permission would be expected to indicate their non-acceptance of a particular obligation at the time of consideration of their application, with a right of appeal available then if the provisions of an obligation were regarded as unacceptable. On balance, therefore, 'no' until the potential implications for a right of appeal are thought through and provided for.

10.95 *Huw Williams (Geldards)*: I think that such a far-reaching proposal should await a comprehensive review of the planning obligation system. The underlying basis of the present system is the principle that positive obligations and particularly financial obligations should only be secured by agreement in advance of a grant of planning permission.

Making a planning obligation subject to the enforcement system raises the question of whether a new form of planning condition placing positive obligations on any person implementing a planning permission should be considered. Such conditions would have to be subject to disclosure in draft, but would (unlike planning obligations at present) be capable of being subject to appeal. An appeal mechanism would probably address one of the most persistent criticisms of the present system namely the delay in negotiation obligations. As suggested by Consultation question 10-6

straightforward financial obligations could be secured by a statutory financial charge on the land.

CONSULTATION QUESTION 10-6.

Section 106(12) TCPA 1990 empowers the Welsh ministers to provide regulations for the breach of an obligation to pay a sum of money, to result in the imposition of a charge on the land, facilitating recovery from subsequent owners. No such regulations have been made: does their absence cause a problem in practice?

Number of responses

10.96 Total: 30 (15 suggesting that their absence is unproblematic, 3 suggesting that charges should not be allowed; 8 suggesting that absence of regulations is problematic; 2 equivocal responses, and 2 others).

Responses suggesting that its absence does not cause problems

10.97 Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Lawyers in Local Government; PEBA; Mineral Products Association

10.98 *Institution of Civil Engineers Wales*: No. The proposal to define such an absence of payment as a breach of planning control should cover this situation.

10.99 *Newport City Council*: It is not necessary, can be achieved by other procedures.

10.100 *PINS*: This does not appear relevant to the work of PINS, and is more likely relevant to LPAs. Though, an absence of such regulations does not appear to have impacted upon the Inspectorate.

10.101 *Pembrokeshire Coast NPA; National Parks Wales POSW; Monmouthshire CC; Pembrokeshire CC; Neath Port Talbot CBC; Caerphilly CC; Carmarthenshire CC*: We assume that the regulation for direct charges on land have not been brought in as planning obligations are local land charges and as such can effectively be turned into charges with a power of sale. Therefore it would seem that there is no need for direct charges over land although they may be easier to enforce than local land charges.

Responses suggesting that charges on the land should not be allowed

10.102 *Home Builders Federation*: The HBF are concerned that on housing sites that such regulations could be used against individual home owners who effectively become the owner of the site, in most cases, once the development is completed.

10.103 *Sirius Planning*: We object to the imposition of a planning obligation charge on the land, in the event that an obligation is breached. These obligations could relate to tenanted operations and therefore the landowner would be liable and experience costs redeeming fees from the tenants.

10.104 *Redrow Homes*: It would not be in the public or LPA interest to impose a land charge on the land the subject of the planning application whereby it had been sold to

individual home owners. Redrow would not suggest introducing any mechanism allowing this.

Responses suggesting that its absence does cause problems

10.105 Pembrey and Burry Port Town Council

10.106 *Allan Archer*: On the face of it, this seems to be a potentially valuable mechanism and it is puzzling why the Regulations have not been made. In principle, I'd support its retention unless someone can come up with a good reason why this should not proceed.

10.107 *Caerphilly CBC, POSW South East Wales & Cardiff Council*: No, but it would be helpful as a way of securing repayment in time, or as a threat that may lead to earlier payment.

10.108 *Blaenau Gwent CBC*: This would provide an additional and useful enforcement tool.

10.109 *RTPI*: In principle this appears a potentially valuable mechanism.

10.110 *Rhondda Cynon Taf CBC:* To date this Authority has not undertaken any action regarding a breach of an obligation which has resulted in the need for significant and complex planning and legal input, with the associated time and costs. However, it is considered that in such instances a LPA should be able to seek to recover the costs of any action it seeks to pursue by means of the imposition of a charge on the land, thereby facilitating recovery from subsequent owners.

10.111 *Bridgend CBC*: No as this already effectively happens as planning obligations are entered onto the Local Land Charges Register. It would be a useful power as LPAS rely on developers to "play fair" in discharging their obligations. It may be more useful to provide that 106s must be registered in the Land Registry as well as local land charges and to give LPAs a specific power to require bonds to secure obligations.

Equivocal comments

10.112 *Torfaen CBC:* Not sure.

10.113 *The Law Society; Huw Williams:* Where the planning obligation provides for a single payment, a well-advised planning authority will require the payment on completion of the planning obligation and contemporaneously with the issuing of the planning permission. In cases where payments are staged over the life of a development, there may be more scope for developers to encounter difficulty in meeting payments. Other forms of enforcement may not be viable where the developer is facing severe financial problems. In other cases, successors in title are likely to seek assurances or indemnities from the original obligor that the sums due have been paid.

We encountered some differences of view in whether the regulation should be made at the earliest opportunity, or whether the provision be retained pending a more comprehensive review.

A comprehensive review could consider whether certain positive obligations could be imposed by simple condition. For example, does a small developer contribution of,

say, £10,000 towards play area and open space provision in a development merit the cranking up of the planning obligation machinery, when a simple condition requiring the payment of that amount for that specified purpose before commencement of development would probably be sufficient. When acting for planning authorities, we have experience of small developers and individuals asking if they can simply come round and make the payment without the formality of the planning obligation and attendant costs.

Other comments

10.114 *Merthyr Tudfil CBC*: Agreed.

10.115 *Newtown and Llanllwchaiarn Town Council:* Refer to response 10.1, 10.2, 10.3.

CONSULTATION QUESTION 10-7.

We provisionally propose that the use of standard clauses in planning obligations should be promoted in Welsh Government guidance. Do consultees agree?

Number of responses

10.116 Total: 38 (33 in agreement, 5 in agreement subject to conditions, and 1 other).

Responses in agreement (without further comment)

10.117 Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Glamorgan Gwent Archaeological Trust; Merthyr Tudfil CBC; Monmouth TC; Home Builders Federation; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Keith Bush; PEBA

Responses in agreement (with additional comment)

10.118 *Institution of Civil Engineers Wales*: Yes. No objection to the use of (appropriately drafted) standard clauses, but this is not likely to appreciably speed up or shorten the timescale to reach agreement.

10.119 *Allan Archer*: I agree on the basis that this reflects current good practice (e.g. affordable housing clauses) and should form part of guidance.

10.120 *POSW; Pembrokeshire Coast NPA; National Parks Wales; Ceredigion CC; Pembrokeshire CC & Monmouthshire CC*: Agreed, most authorities already do this, but there is a difficulty with private lawyers being paid to check over agreements and to justify their fee- constantly requiring minor adjustments. So standard clauses would be appropriate to promote.

10.121 *Carmarthenshire CC*: Agreed. LPAs already have standard clauses & s106 templates however private lawyers are constantly requiring minor adjustments so standard clauses would be appropriate to promote.

10.122 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government*: Yes. The adoption of model forms of words for certain generic obligations would be useful provided they recognize that the precise circumstances of each case may justify a variation or departure from the standard clauses.

10.123 *Theatres Trust*: For the purposes of simplification and clarity, the Trust supports this proposal. However, to facilitate unique site-specific circumstances we would encourage guidance to present some flexibility to deviate from standard clauses where it can be justified.

10.124 *National Trust*: Support the principle of standard Planning Obligation clauses on a pan Wales basis.

10.125 *Redrow Homes*: Redrow would support the provision of a dispute resolution procedure relating to S106. The main feature of this is knowing how long the process will take to be resolved.

10.126 *Mineral Products Association*: we support the use of standard clauses in Welsh Government Guidance, as it applies to planning obligations. Similarly, pre-application engagement is welcomed. There may also be benefits to allowing an applicant to prepare a draft planning obligation to accompany an application or at any time during the determination process. Whilst ultimately it should be the planning authority's responsibility to prepare a draft obligation, it is evident that some authorities have difficulty doing this.

10.127 *Bar Council*: The Bar Council supports the simplification and clarity such guidance would bring albeit that the specification should not impede freedom to agree provisions which differ from the standard conditions.

10.128 *Canal & River Trust*: Agree. Such standard clauses would save a considerable amount of time and expense to the LPA and development together with parties who are not signatories to the agreement but are the beneficiaries of an obligation.

10.129 *Cardiff Council*: Yes. Discretionary/guidance for LPAs rather than mandatory which may not be appropriate in all cases.

10.130 *Law Society & Huw Williams (Geldards)*: Some years ago, the Law Society, with the support of the DCLG developed a model form of section 106 planning obligation. I believe that it was found to be a useful precedent, notwithstanding some criticism of the original version in the Journal of Planning Law in relation to the balance it sought to strike between the interests of the developer and the planning authority. However, along with the introduction of the NPPF, the DCLG's support for the Law Society's Model Form was withdrawn and it has not been updated since. I think the is a strong case for the main stakeholders in Wales — Planning Officers' Society Wales, RTPI Wales and the Law Society collaborating with Welsh Government on an update to be promoted in Planning Policy Wales or as part of a Technical Advice Note.

10.131 *PINS:* From an inspector's point of view, the use of standard clauses in s106 documents would help significantly when considering these. Concerns re the legality of unfamiliar clauses would be reduced and more attention could be devoted to their substance.

Responses in agreement (subject to conditions)

10.132 *Blaenau Gwent CBC*: Agree provided local flexibility is maintained.

10.133 *RTPI*: We support this in principle, subject to consultation on the draft standard clauses and the ability for developers/LPAs to revise these where required in specific cases.

10.134 *Newport CC*: Agree providing it is guidance only. Law Society already provides standards.

10.135 *Natural Resources Wales*: We would support the use of standard clauses in planning obligations to provide consistency and certainty. However, it would be difficult to prepare clauses which are reflect all possible scenarios. This should be highlighted in any guidance, and the standard clauses should be promoted as best practice. We agree that these standards should be promoted in Welsh Government guidance. We would seek further guidance on how these provisions could be used to deliver environmental improvements.

10.136 *Rhondda Cynon Taf CBC*: Yes, agree although there should be recognition that often S.106 Agreements can cover relatively complex matters that are site specific, which limits the ability to use standard clauses in all cases.

Other responses

10.137 *Newtown and Llanllwchaiarn Town Council*: Refer to response 10.1, 10.2, 10.3

CONSULTATION QUESTION 10-8.

We provisionally consider that the introduction of a procedure to resolve disputes as to the terms of a section 106 agreement in Wales (along the lines of Schedule 9A to the TCPA 1990, to be introduced in England by the section 158 of the Housing and Planning Act 2016) might be useful. Do consultees agree in principle, and what should be the features of such a procedure?

Number of responses

10.138 Total: 31 (21 in agreement, 5 equivocal responses, 3 in disagreement, and 2 others).

Responses in agreement (without further comment)

10.139 Merthyr Tudfil CBC; Blaenau Gwent CBC; Home Builders Federation

Responses in agreement (with additional comment)

10.140 *POSW; Monmouthshire CC; Carmarthenshire CC; Ceredigion CC; Pembrokeshire CC; Neath Port Talbot CC; Pembrokeshire Coast NPA & National Parks Wales*: Agreed, resolution through an arbitration like panel arrangement would be a useful tool

10.141 *Country Land and Business Association*: Yes. The features of the procedure should mirror those introduced in England, albeit focussed on Welsh ministers who will have to appoint a mediator. There are tried and tested methods for dealing with disputes with binding decisions on both sides. These include RICS Arbitration – Dispute resolution service and the Lands

10.142 *Bridgend CBC*: Yes. Resolution over viability should be undertaken by an open book review by the independent District Valuer at the applicant's cost.

10.143 *Huw Evans*: Agree that a dispute resolution opportunity is needed.

10.144 *Caerphilly CBC, POSW South East Wales & Cardiff Council*: Yes, but the process should be quick (say one moth turnaround), and based on written representations. The LPA will have done the work to justify the section 106 in preparing their report about the planning application. The applicant can use that as the basis of the appeal, and submit a full case at the start.

10.145 *Mineral Products Association*: we support proposals to introduce a procedure to resolve disputes associated with obligations. The procedure should however, be quick and transparent. The matter could readily be resolved by written procedure.

10.146 *Keith Bush*: Agree in principle.

10.147 *PEBA*: Yes – the relatively recently enacted new procedure under schedule 9A to the TCPA 1990 provides the template for the procedure.

10.148 *Torfaen CBC*: Yes, in principle, although need to give it further thought.

Equivocal responses

10.149 *Newport CC*: We can already resolve disputes through the court and applicants can apply to vary the agreement. However an arbitration panel could introduce national standards but process should not be overly inviting.

10.150 *The Law Society*: Our contributors did not have a unanimous position on this. Some thought the proposed procedure desirable. Others felt that the machinery in England is likely to prove cumbersome and difficult to operate and favour consideration of mediation/ADR approaches as part of a more comprehensive review of planning obligations.

10.151 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Lawyers in Local Government*: Such a provision would be helpful in principle, but we have not come across many examples of such disputes. The suggestion seems to raise many questions, such as: who would pay for such arrangement? Would it be binding on the parties? Would a referral have to be joint? Would a referral be open to a successor in title to the original covenantor / developer? Would there be a time limit for a referral? Would the process be open to public scrutiny as should be the process of drafting and agreeing the obligation? Would the mechanism be open to submissions from third parties?

10.152 *Rhondda Cynon Taf CBC*: Agreements should be broadly understood and agreed by the LPA and applicant's/developers prior to a resolution to grant a planning permission. However, this Authority has experienced a number of cases where the broad scope and content of a S.106 has been agreed and this has then fed into an officer report to Committee and recommendation. Following a resolution by the LPA to grant permission a case is subsequently put forward by the applicant/developer that the requirements (some or all) of the S.106 cannot be met because of viability reasons, albeit these were advanced at an earlier stage. The ability of an applicant/developer to dispute the requirement/s of a S.106 should be restricted if earlier agreement is reached. Also any procedure should have clearly set time limits, in order that matters are not protracted over a lengthy period.

Responses disagreeing

10.153 *Allan Archer*: I think that it is a little premature to make a convincing case for bringing forward provisions similar to s158 of the H&PAct 2016 recently introduced in England while those provisions remain untested in practice and the provisions necessary to bring this section into effect have not yet been produced. I do not find the provisions of Schedule 13 of that Act, which support s158, particularly reassuring about the practicalities – they seem quite complex. What evidence exists to suggest that such arrangements are needed? A remedy does exist for applicants unwilling to agree the terms of a s106 which is to appeal against non-determination – the reasonableness and terms of a s106 can then be considered as part of the appeal. Twin-tracking will also enable negotiations about the terms of a s106 to continue when an appeal is submitted on one of the applications. Another alternative would be the use of mediation. Do we really need another more complex remedy?

10.154 *RTPI*: We question whether it is a little premature to make a convincing case for bringing forward provisions similar to s158 of the Housing & Planning Act 2016 recently introduced in England. Those provisions remain untested in practice and the provisions necessary to bring this section into effect have not yet been produced. What evidence exists to suggest that such arrangements are needed? A remedy does exist for applicants unwilling to agree the terms of a s106 which is to appeal against nondetermination – the reasonableness and terms of a s106 can then be considered as part of the appeal. Another alternative would be the use of mediation. We would suggest that given CIL is now devolved to Welsh Ministers, a comprehensive review is undertaken of the S106 and CIL regime and an approach tailored to Wales is developed.

10.155 *Huw Williams (Geldards)*: Disagree. Discussion on appropriate dispute resolution mechanisms should await a comprehensive review of planning obligations in view of the range of possibilities that might be adopted — see for example the response to Question 10-5 above.

Other responses

10.156 *Newtown and Llanllwchaiarn Town Council*: Refer to response 10.1, 10.2, 10.3.

10.157 *PINS*: It is not clear if this proposal is mediation, and so PINS cannot comment without further detail at this stage.

CONSULTATION QUESTION 10-9.

We provisionally consider that the introduction of a procedure for the Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations as they relate to particular categories of benefits to be provided (along the lines of section 106ZB of the TCPA 1990, introduced by section 159 of the 2016 Act with regard to obligations as they relate to the provision of affordable housing) might be useful.

Do consultees agree in principle, and what categories of benefits might most appropriately be subject to such a procedure?

Number of responses

10.158 Total: 30 (5 in agreement, 11 in agreement subject to conditions, 12 equivocal responses and 2 in disagreement).

Responses in agreement (without further comment)

10.159 Merthyr Tudfil CBC; Blaenau Gwent CBC

Responses in agreement (with additional comment)

10.160 *PEBA*: Yes – again, we suggest that the relatively recently enacted new procedure under section 106ZB of the TCPA 1990 provides the appropriate model for the procedure, with power being given to extend the categories of benefits to which the provision applies by regulations.

10.161 *Country Land and Business Association*: Yes in principle. Section 159(1)(b) of the Housing and Planning Act 2016 related to the provision of starter homes in England. The CLA lobbied successfully to ensure that starter homes could not be imposed on rural exception sites, nor in national parks and AONBs (proposed cap too high for rural wages).

10.162 *Keith Bush*: Agree in principle

Responses in agreement (subject to conditions)

10.163 *Pembrokeshire Coast NPA; National Parks Wales; POSW; Neath Port Talbot CC; Pembrokeshire CC; Monmouthshire CC & Ceredigion CC*: Assumed that this was brought in to lessen burden on developments already with planning permission and subject seemingly to overly zealous planning obligations.

Agreed, with proviso that this section does not apply in relation to a planning obligation if—

a) planning permission for the development was granted wholly or partly on the basis of a policy for the provision of housing on exception sites, or

b) the obligation relates to development in a National Park or in an area designated under section 82 of the Countryside and Rights of Way Act 2000 as an area of outstanding natural beauty.

Categories of development – affordable housing only

10.164 *Home Builders Federation*: The HBF supports this proposal but suggest as in England it is limited to affordable housing.

10.165 *The Law Society & Huw Williams (Geldards)*: On balance, we think the introduction of a provision of this type in Wales should await a comprehensive review of planning obligations. However, the principle of such provision is agreed. If the procedure was adopted the matters that should be addressed are:

a) Place the definitions of affordable and social rented housing on a statutory basis (see TAN 2).

b) A power for a planning obligation to require the transfer of land and buildings to a third party as affordable or social rented housing.

c) An express power to apply "cascade" type procedures to identify suitable occupiers.

A power to impose a statutory covenant in favour of the planning authority that dwellings to be maintained as "affordable" or "social rented" dwellings "in perpetuity".

10.166 *Bridgend CBC*: Yes – but to Affordable Housing only, as is the case in England. However, it might be a better solution for the WG to produce guidance on obligations and, if a developer wants to challenge the obligation, they can lodge an appeal and offer a UU at the appeal stage which reflects the WG guidance.

Equivocal responses

10.167 *Caerphilly CBC, Newport CC; POSW South East Wales & Cardiff Council*: The purpose and potential outcomes of this proposal is unclear and needs further discussion.

10.168 *PINS*: It is not clear what is meant by this proposal and so further clarification is needed.

10.169 *Torfaen CBC*: Not sure.

10.170 *Mineral Products Association*: we must reserve judgement on proposed procedures for Welsh Ministers to impose restrictions or conditions on the enforceability of planning obligations until further details of the scope of these are available.

10.171 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government*: This is questionable if it is proposed to impose such restrictions or conditions beforehand in terms of general guidance or regulations. How could such provisions be justified or relevant to the particular development when the requirement for obligations is that they are relevant and proportionate to the development. What is the overlap here between this proposal and the right of appeal (or subsequent

application) where a developer disagrees with what is required of them in an obligation?

10.172 *RTPI*: We again question whether it is premature to make a convincing case for bringing forward provisions similar to the Housing and Planning Act in England, that are not yet in force and therefore untested. Further discussion is required on this matter and see our previous comment on the need for a review of the CIL and S106 system in Wales.

10.173 *Canal & River Trust*: In order for the Trust to be able to respond fully to question 10-9 it considers that it would assist greatly to be provided with more detail and information as to the type of restrictions or conditions on the enforceability of planning obligations that Welsh Ministers propose to impose.

10.174 *Newtown and Llanllwchaiarn Town Council*: Refer to response 10.1, 10.2, 10.3.

10.175 *Rhondda Cynon Taf CBC*: In principle this appears to be a reasonable proposition, although any procedure should not seek to undermine the local planning process and the ability of the individual LPA to identify and negotiate those areas seen as being required within the content of a planning obligation.

Responses disagreeing

10.176 *Institution of Civil Engineers Wales*: No. Proposal too restricting.

10.177 *Allan Archer*: Isn't this provision (s159) part of the current Westminster Government's drive to undermine planning authority's ability to secure some affordable housing as part of planning permissions for market housing development? Unless I am mistaken about this, I question the need for this provision to be introduced in Wales given the strong WG and Planning Authority policies for affordable housing contributions. Also, as above, I think that it is a little premature to make a convincing case for bringing this proposal forward while it remains untested in practice and the provisions necessary to bring this section into effect have not yet been produced.

CONSULTATION QUESTION 10-10.

We provisionally propose that planning authorities should be able to enter into planning obligations to bind their own land in appropriate cases. Do consultees agree?

Number of responses

10.178 Total: 34 (27 in agreement, 1 equivocal response and 6 other responses).

Responses in agreement (without further comment)

10.179 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Cardiff Council; Merthyr Tudfil CBC; Blaenau Gwent CBC; Monmouth TC; Home Builders Federation; Newport CC; Torfaen CBC; Neath Port Talbot CC; RTPI; Keith Bush; Allan Archer (14)

Responses in strong agreement (with additional comment)

10.180 *The Law Society & Huw Williams (Geldards)*: Agree strongly. The problem identified arises where a local authority is the owner of land, possibly having assembled a site itself with a view to its future development with the benefit of planning permission. The questions raised in paragraph 10.63 would be avoided by making the power dependent upon an intention to dispose of the land with the benefit of planning permission. The ability to do this could be further restricted by a requirement that a disposal would have to occur within, say, six months of the resolution to grant permission.

Responses in agreement (with additional comment)

10.181 *Ceredigion CC; Pembrokeshire CC; Pembrokeshire Coast NPA; National Parks Wales; POSW & Monmouthshire CC*: Agreed. Property sections of Authorities often tempted always to go for best value (in terms of financial gain) and negotiations with them on planning applications can be a fraught exercise.

10.182 *Carmarthenshire CC*: Agreed. Will simplify matters if obligations can be entered into by the Council.

10.183 *Association of Local Government Ecologist*: We agree LAs should be able to bind their own land via planning obligations as such land may become an important resource to off-set impacts going forward, particularly in relation to biodiversity. Applicants rarely have access to additional land to provide off-setts or compensation so the ability to use LA land is commonly requested and desirable.

10.184 *Bridgend CBC*: Yes. The existing restrictions can frustrate the disposal of Council owned assets, though it can be overcome

A possible model could be the now-repealed section 299A of T&CPA 1990, which enabled Crown land to be sold subject to s. 106 obligation notwithstanding that the Crown at that time was not subject to the Planning Acts generally, Consultation Question 19-11 (Interests other than owners')

10.185 *PINS*: This does not appear to impact on the work of PINS, though seems appropriate.

10.186 *PEBA*: Yes. But provision would need to be made for enforcing compliance with such an obligation.

10.187 *Andrew Ferguson*: I fully support this proposed alteration to enable LPAs to bind its own land in a S106 agreement. At the current time, there is always uncertainty with regards to the correct procedure to overcome this issue (condition, signing of sale contract and then S106 contract subsequently or including controls within the sale of land), and it is not always considered at the outset of the process which adds further delays when it comes to preparation and resolution of issues. Enabling Local Authority land to be bound by a planning obligation would simplify this process. The only comment with regards to a prospective purchaser signing the S106 would be the effect that would have on the agreement if the purchaser does not follow through with the purchase and someone else develops the site. It is unclear why this is required

given that the effect generally falls on subsequent buyers. The landowner may also not wish to sell the land and may not want a consent in place with the S106 as agreed.

Equivocal responses

10.188 *Rhondda Cynon Taf CBC*: Whilst such a power could be helpful in some circumstances, the absence of such an ability thus far has not been seen as a significant issue.

Other responses

10.189 *North and Mid Wales Association of Local Councils*: To aid development the Association feels that any CIL or Section 106 Agreement funding should be calculated (including the Social Housing element) as follows:

- Value of site with the planning consent granted: Y
- Value of the site without consent but taking into account the existing use: X
- Gross difference (uplift): Y – X
- 50% of the difference can be applied to the CIL or Planning Agreements.

The Council feels that there should be an insentative to develop, anything more onerous than that set out above would not attract developers to implement consents.

10.190 *Country Land and Business Association:* Requires more detail on the pros and cons.

10.191 *Mineral Products Association*: we would again raise the question of enforceability as we have raised above with temporary permissions.

10.192 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government*: Only when it has been satisfactorily resolved as to how an authority can covenant with itself; enforce against itself; and prosecute or take injunctive proceedings against itself.

10.193 *Newtown and Llanllwchaiarn Town Council*: Refer to response 10.1, 10.2, 10.3.

CONSULTATION QUESTION 10-11.

We provisionally propose that a person proposing to enter into a contract for the purchase of land should be able to enter into a planning obligation so as to bind that land, which would take effect if and when the relevant interest is actually acquired by that person. Do consultees agree?

Number of responses

10.194 Total: 35 (14 in agreement, 7 in agreement subject to conditions, 2 equivocal responses and 12 in disagreement,).

Responses in agreement (without further comment)

10.195 Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Monmouth TC: Home Builders Federation; Keith Bush

Responses in agreement (with additional comment)

10.196 *Accessible Retail*: We support this recommendation. Any measure to help expedite disagreement is to be welcomed and it is widely viewed that the 2016 procedure achieves this aim.

10.197 *Barratt & David Wilson Homes South Wales:* We are supportive of allowing Local Planning Authorities to enter into S106 Agreements.

10.198 *PINS*: Yes. This would simplify and speed up arrangements and thus expedite the development being permitted.

10.199 *Torfaen CBC*: Yes, subject to appropriate safeguards.

10.200 *Sirius Planning*: We support the provision to allow a person proposing to enter into a contract for the purchase of land to be able to enter into a planning obligation, as this will enable applicants to pursue planning permission and transfer obligations onto a potential purchaser.

10.201 *The Law Society & Huw Williams (Geldards)*: Agree strongly. This correlates with the previous question.

10.202 *Rhondda Cynon Taf CBC*: Yes, agree this is a sensible position to introduce and should aid the process of development thereby bringing sites forward more quickly.

Responses in agreement (subject to conditions)

10.203 *Central Association of Agricultural Valuers*: We believe this should be possible, enabling a conditional contract with a possible owner only becoming effective on their acquiring actual ownership rather than requiring a vendor always to be a party to the contract. This might be helpful with land assembly or enable a better resourced buyer to take matters forward. However, it cannot be right for a third party to bind land he does not own and whose owner may not want the development or have no intention of applying for it. Thus, it would be right to think further about the actual status of such a planning obligation agreement

10.204 *Neath Port Talbot CBC:* Agreed in principle. The theory behind the proposal is accepted on the basis that it allows a prospective developer to enter into the legal agreement which would only activate the planning permission once they become the landowner. It could however introduce a complication given that planning permission normally goes with the land rather than the applicant and this amendment would effectively turn that on its head.

10.205 *Bridgend CBC*: Yes if the S106 is only signed after the land has been acquired by the applicant. More details on how this would work in practice would be necessary.

10.206 *PEBA*: Yes, but this will need to take account of the possibility that the land may be sold to some other person. If planning permission (which runs with the land) has been granted, it will be important that the purchaser (whoever it is) is bound.

10.207 *Caerphilly CBC; POSW South East Wales & Cardiff Council*: Yes, but safeguards should be introduced to ensure that if they don't proceed and someone else buys the land, the S106 still applies and doesn't have to be renegotiated. Note the renegotiation period for a S106, and the potential for viability issues.

Equivocal responses

10.208 *RTPI*: Further clarification is required. As the planning obligation usually only takes effect at commencement of development and is, in any case, bound to the land, will this make any difference in practice? Does it negate the need for the current landowner (and, potentially, funders) to enter into the s106 agreement? What would the position be if the prospective owner did not proceed to acquire the land and another party were to acquire the land and proceed with the development? The planning authority would need to have an absolute guarantee that whoever eventually proceeded with the development was bound by a s106 subject to which a planning permission was granted. Would the proposal provide this safeguard?

10.209 *Newtown and Llanllwchaiarn Town Council*: Refer to response 10.1, 10.2, 10.3.

Responses disagreeing (with additional comment)

10.210 *Institution of Civil Engineers Wales*: No. This could result in wasted legal fees by the Planning Authority if the tentative development proposal failed to become a reality.

10.211 *Allan Archer*: What would the position be if the prospective owner did not then proceed to acquire the land and another party were to acquire the land and proceed with the development? The planning authority would need to have an absolute guarantee that whoever eventually proceeded with the development was bound by a s106 subject to which a planning permission was granted. Would the proposal provide this safeguard?

10.212 *Pembrokeshire Coast NPA; National Parks Wales; Pembrokeshire CC; POSW, Monmouthshire County Council, Carmarthenshire CC & Ceredigion CC*: S106 agreements are effectively covenants binding on land and should bind any party whose interest in the land could affect the enforceability of the covenant. If the intention is to bind a mere contractual interest - the planning permission would have to be personal to the parties to the contract otherwise the freehold owner or any other party could develop without being caught by the planning obligation. Have the implications have been fully understood?

In reality the prospective purchaser will enter into conditional contract with the seller which includes an obligation for the seller to enter into a section 106 agreement. Generally such contracts will be conditional upon the grant of planning permission. It is therefore in the seller's interest to enter the section 106 agreement to secure planning permission and then the sale proceeds. If the developers find themselves in a position where the landowner will not sign a section 106 they have either been badly advised or they are commercially naive.

10.213 *Andrew Ferguson:* it is unclear what problem this is trying to solve. There would be complications if permission was granted but the landowner hadn't signed the S106 agreement as they wouldn't be bound by it. They could then develop/ sell the land and not be bound by the agreement? The landowner may also not wish to sell the land and may not want a consent in place with the S106 as agreed by someone else.

10.214 *Newport City Council*: No it would over complicate the process.

10.215 *Canal & River Trust*: We consider that such provisions should only apply in the absence of an objection from the landowner to the planning application. Subject to this, we can see merit in the proposal in circumstances where an applicant has an interest in the land by virtue of an option or a conditional sale agreement with the landowner, as the proposal could limit any time delays waiting for the completion of land sales contracts and the relevant title being update by the Land Registry.

10.216 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Lawyers in Local Government*: This presupposes a situation where a landowner is unwilling to develop his land but a developer is prepared to go to the cost of making an application and entering an obligation for that same land. We have not come across such a situation and so do not think this is a pressing problem which requires an answer.

CHAPTER 10: GENERAL COMMENTS

10.217 *UK Environmental Law Association*: The negotiation of planning obligations and the community infrastructure levy are important tools in providing for environmental protection and improvement as part of the planning process. We believe that amendments to these systems should be subject to a separate consultation.

10.218 *Friends of the Earth Cymru*: We do not think that the provisions on CIL should be adopted without a separate consultation that considers the entire issue of betterment, planning gain, obligations and land value tax. There is far too little public benefit from the rise in land values, and a systematic capture of value of land uplift to put back into the provision of public infrastructure must be put into operation in Wales. We are of the view that this is a very topical issue and one that the Law Commission should not be making proposals on streamlining code without public debate, or proper Assembly input through Committee inquiry.

On whether planning obligations are 'necessary to make the development acceptable in planning terms' we consider this could be too narrow. Planning obligations are also about capturing the uplift in value for public benefit (the sum to be paid to the authority), particularly in terms of paying for the physical and social infrastructure that the development will rely upon or entail. The Law Commission should consider the history of planning gain since betterment and not preclude the re-formulation of the Welsh approach. The Mirrlees Review (of tax), the Bevan Foundation, the IWA, and a number of AMs have raised the issue of land value tax for example.

We support the approach of a planning authority binding its own land by planning obligation. It would be useful to clarify this alongside covenants. Public land should retain 'public interest' provisions.

10.219 *Chartered Institute of Building:* The CIOB believes there needs to be a far more strategic look at the aims and outcomes of planning. This would include measurement, control and a deeper understanding. It could be that links with building regulations, especially in the aftermath of Grenfell with the Hackitt Review, need to be strengthened. Without checks and balances, and any course of redress, there is no way of finding out what has gone wrong, never mind actually correcting it. In addition, we need to move away from the current risk-averse approach that is primarily focussed on compliance, rather than delivering tangible outcomes.

10.220 *SP Energy Networks:* The lack of clarity on national infrastructure development as set out in UK and Welsh planning law is particularly evident in Chapter 10 which deals specifically with infrastructure but is limited to CIL and Planning Obligations. It is noted that Table 3.1 sets out potential chapter headings for the consolidated approach, however this does not adequately address infrastructure at a national level. It is considered there is an opportunity to be more prescriptive and define infrastructure development in this chapter, by setting out what type of infrastructure development falls to be decided in Wales.

10.221 *National Grid:* Planning obligations are an important part of how the planning system operates. The proposals to incorporate the terms of the current TCAP s106 - s106B into the Bill makes sense. The other suggestions allowing for interpretation disputes to be resolved, and to make enforcement clearer are supported. The suggestions to change who may make a planning obligation are also supported. These are considered revisions which are likely to make a useful contribution to the operation of the planning system. [10-2, 10-3, 10-5, 10-8, 10-10, 10-11]

10.222 *Mineral Products Association:* Under paragraph 10.77 we believe that the issue of "double dipping" is wholly inappropriate and measures to alleviate this will be supported.

10.223 *RTPI:* General points – Relationship between CIL and Planning Obligations

10.224 We support the statement in paragraph 10.75. We agree that an integrated approach is preferable, and that any new system should combine the best of both current regimes in an integrated way, but any new system will need to be developed in light of the development needs of Wales.

10.225 *Mike Goodall:* Clarity around Arsenal clauses in s106 to tie in future land owners is also necessary, especially for regeneration schemes that will have a CPO element. When dealing with their own Council's applications, LPAs should be able to issue a planning permission with a Unilateral Undertaking that bites on people who acquire an interest in the land.

10.226 *The Law Society, Huw Williams:* We would draw attention to the IAG recommendations 85 a. and b. which suggested further useful clarifications of areas of uncertainty identified by the Planning and Environment Committee of the Law Society by providing for:

a) Due execution in a similar manner to documents executed under property or company legislation; and

b) Making it clear that a planning obligation can be specified to bind only specified successors in title. This would avoid suggestions in housing developments that obligations bound the purchasers of individual market dwellings. Consultation Question 11-1 (Appeals to determine matter afresh)

10.227 *Presteigne & Norton Town Council:* The imminent passing of control of infrastructure funding/Community Infrastructure Levy to Welsh Government was felt to be a good thing and the Town Council would like to see this being made more formal so that it could be introduced uniformly throughout Wales. At present our unitary authority does not have any formal policy on CIL although one is under consideration in the LDP currently in production.

10.228 *South Wales Police:* In the event that any financial impact is identified and contribution sought to support the same e.g. additional infrastructure costs, we would ask that the planning legislation permits any such provisions to be represented in the relevant section 106 agreement and/or other relevant planning documentation.

Chapter 11: Appeals and other supplementary provisions

CONSULTATION QUESTION 11-1.

We provisionally propose that the provision, currently in section 79(1) of the TCPA 1990, as to the powers of the Welsh Ministers on an appeal, should be amended so as to make it plain that they are required to consider the application afresh – as opposed to having a power to do so, as at present. Do consultees agree?

Number of responses

11.1 Total: 37 (31 in agreement, 4 in disagreement and 2 others).

Responses in agreement (without further comment)

11.2 Institution of Civil Engineers Wales; Pembrokeshire Coast NPA; National Parks Wales; Penstrowed Community Council; Caerphilly CBC, POSW South East Wales; Cardiff Council; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Monmouth TC; Theatres Trust; Pembrokeshire CC; Newport CC; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Keith Bush; PEBA

Responses in strong agreement (with additional comment)

11.3 *Allan Archer:* I support this proposal very strongly as it should ensure a consistent approach to the task of dealing with an appeal.

Responses in agreement (with additional comment)

11.4 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Lawyers in Local Government:* Agreed – this confirms what essentially happens in any event, and accordingly such change would make clear to all parties the process to be undertaken by the Inspector.

11.5 *Andrew Ferguson:* This provision is considered useful as it will ensure that all comments/ issues raised are addressed at appeal irrespective of whether the LPA considers them to be acceptable – however this will impact to a degree on the workload of PINS given they will have to consider it all afresh.

11.6 *The Law Society & Huw Williams (Geldards)*: We agree. This accords with the position in practice.

11.7 *RTPI:* This would assist with clarity.

11.8 *UK Environmental Law Association*: We agree that it should be made plain on the face of the Bill that an appeal should consider the application afresh. Such clarity is necessary to ensure that all parties, including those who wish to oppose development

are able to fully understand this process. Similarly, we agree that it should be made clear who will determine planning appeals.

11.9 *Rhondda Cynon Taf CBC*: Agreed - this will provide greater clarity.

Responses disagreeing

11.10 *PINS:* Inspectors may consider an appeal proposal 'de novo' (afresh) but in practice the Inspector's starting point will be the LPA's reason(s) for refusal (in non-determination cases there are usually putative reason(s) for refusal). If Inspectors consider there are substantive matters that would be determinative but which are not the subject of a reason for refusal they will raise and consider them but such occurrences are rare.

The Act as currently worded allows Inspectors the necessary flexibility to go beyond main issues if required. Reasons for refusal should be clear, precise and comprehensive and, unless evidence indicates otherwise, Inspectors should be entitled to assume that all other aspects of a development have been considered thoroughly by the LPA and deemed to be acceptable. To require all matters to be considered afresh is likely to result in unnecessary duplication of the work carried out by the LPA at application stage. It would also increase the time and cost of appeals to both the PINs and LPAs as LPAs would need, in their statements of case, to justify why elements are acceptable as well as justify the reasons for refusal.

Further, the Courts have established that Inspectors do not have to address all material considerations in their decisions. If cases were required to be considered afresh, this would require them to address all material considerations. The discretion allowed currently to elevate considerations if necessary, is appropriate. PINS do not agree, therefore, that in practice we usually start afresh and consider that the provisions of section 79(1) should remain as they are

11.11 *Country Land and Business Association*: No. The CLA considers the current powers are perfectly adequate.

11.12 *Sirius Planning*: We disagree with the inclusion of this provision. The appeal process would be quicker, and greater certainty for the appellant if, generally, appeals related to the LPA reasons for refusal or matters listed as being in dispute in a statement of common ground. This would save cost and time in an already overstretched appeal system.

11.13 *Bar Council:* It is understood that an appeal under section 78 of the TCPA is an appeal de novo and not a review. The wording in section 79 to which this proposal is directed is that the Secretary of State or Welsh Ministers "may deal with the application as if it had been made to him in the first instance". The Bar Council considers that on balance this adequately describes the circumstances of an appeal given that the application in the first instance is always made to the authority.

Other comments

11.14 *CMet Residents Group*: The applicant has the option of an appeal to the Welsh Assembly Minister in a number of cases, most importantly if his planning application

is refused. However, in the event of an acceptance that they feel is incorrect members of the community have only the option of serving a notice within a specified time period to go to a judicial review as underlined in 11.8 above.

We assume the costs of a judicial review would be prohibitive for the ordinary man in the street in that it would have to be based around a rigorous legal exercise carried out by a legal team briefing a barrister appearing in the High Court.

However, an appeal to a Minister would provide a more straightforward and less costly activity. In addition 11-1 would allow a consideration afresh by the Minister or his representative.

Firstly, to allow the applicant the right of appeal to the Welsh Minister, whilst refusing this to members of the local community affected by the application, is both undemocratic and a denial of natural justice..

Secondly, it would appear that ordinary members of the community are being unjustly penalised financially by only having the avenue of judicial review available to them.

Thirdly, in an Appeal we agree that as you state in 11-1, the Minister should be bound to consider the application afresh, but also to refer to the body of written and verbal evidence built up during the stipulated period for representations, and mentioned at the Council Planning Committee meeting. Surely, members of the community should, firstly be notified that the applicant is going to appeal, and then allowed to make representations, both written and verbal, to the Minister.

In conclusion, the existing legislation appears to discriminate unfairly against the interests of members of the c``ommunity in favour of the applicant. We urge the Commission to consider our points and recommend a revision of the present system.

CONSULTATION QUESTION 11-2.

We provisionally propose that the Bill should make it clear that all appeals (including those relating to development proposals by statutory undertakers) are to be determined by inspectors or examiners, save for:

(1) **those in categories that have been prescribed for determination by the Welsh Ministers; and**

(2) **those that have been specifically recovered by them (in case-specific directions) for their determination.**

Do consultees agree?

Number of responses

11.15 Total: 33 (32 in agreement, 1 in disagreement).

Responses in agreement (without further comment)

11.16 Institution of Civil Engineers Wales; Caerphilly CBC, POSW South East Wales; Cardiff Council; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Andrew Ferguson; Theatres Trust; Pembrokeshire CC; Newport CC; Torfaen CBC; Bridgend CBC; Lawyers in Local Government; Friends of the Earth Cymru; Keith Bush; PEBA

Responses in agreement (with additional comment)

11.17 *Canal & River Trust:* We agree with the proposals as laid out on the determination of appeals.

11.18 *Allan Archer*: As this would bring legislation in line with current practice I support this proposal. I prefer the description 'Inspector' to 'Examiner'.

11.19 *The Law Society & Huw Williams (Geldards)*: We agree. Determination by an Inspector is the default position in all but a small number of appeals each year. The Welsh Government will have the figures but we suspect that Ministerial determinations are in the low single figures per year.

11.20 *RTPI:* We agree, this provides clarity. See our response to 5.11 - We assume that the term 'inspectors' would be more universally understood in the context of the role.

11.21 *POSW; Monmouthshire CC; Ceredigion CC; Neath Port Talbot CC; Pembrokeshire Coast NPA & National Parks Wales*: Agreed. But (2) should more accurately read: "(2) those that have been specifically recovered by the Welsh Ministers (in case-specific directions) for their determination."

11.22 *Rhondda Cynon Taf CBC*: Agreed - this will provide greater clarity.

Responses disagreeing (with additional comment)

11.23 *PINS*: No. This suggested change is not necessary.

CONSULTATION QUESTION 11-3.

We provisionally propose that the power to appoint assessors to assist inspectors to determine appeals that are the subject of inquiries or hearings:

(1) **should be widened so as to be exercisable by inspectors as well as by the Welsh Ministers; and**

(2) **should be extended to allow the use of assessors in connection with applications determined on the basis of written representations.**

Do consultees agree?

Number of responses

11.24 Total: 34 (32 in agreement, 1 in disagreement).

Responses in agreement (without further comment)

11.25 Institution of Civil Engineers Wales; Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Andrew Ferguson; Theatres Trust; Pembrokeshire CC; PINS; Chartered Institute for Archaeologists; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; PEBA; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

11.26 *Allan Archer*: I think it is logical and sensible for the scope to use an assessor at inquiries /hearings be extended to written reps cases but it is important that this stepping up of the use of assessors does not dilute the role of the Inspector.

11.27 *Newport CC*: Yes, subject to no cost to the LPA.

11.28 *RTPI*: This should be welcomed and ensure that a more robust decision is made. It would seem logical, given the scope, to use an assessor at inquiries /hearings to speed up the appeal process. In terms of extending their use to written representations there is a concern that there is a risk that this could weaken the position of the Inspector with more work being given to such assessors resulting in the Inspector merely having oversight of the process. It is important that the appeal process remains rigorous and transparent and this stepping up of the use of assessors does not dissipate the work of the Inspector.

11.29 *Cardiff Council*: Yes. How are Assessors to be appointed; what qualities would they be expected to possess. Inspectors have relevant skills expanding their role to 3rd Parties may need a framework.

11.30 *The Law Society & Huw Williams (Geldards)*: We agree but see previous comment suggesting replacing “Inspector” with “Assessor” and “Assessor” with “Expert Adviser”.

Responses disagreeing (with additional comment)

11.31 *Sirius Planning:* We oppose the provision to widen the appointment of assessors to the Welsh Ministers. These should be instructed through the inspectorate to retain the impartial element and confidence in the planning system.

Other responses

11.32 *Keith Bush:* As it would be the Welsh Ministers who would pay for the assessor, Inspectors should have the permission of Welsh Ministers to appoint an assessor.

CONSULTATION QUESTION 11-4.

We provisionally propose that the changes proposed in Consultation questions 11-1 to 11-3 should apply equally to:

(1) **appeals against enforcement notices;**

(2) **appeals relating to decisions relating to applications for listed building consent or conservation area consent, express consent for the display of advertisements, and consent for the carrying out of works to protected trees; and**

(3) **appeals against listed building and conservation area enforcement notices, advertisements discontinuance notices, tree replacement notices, and notices relating to unsightly land.**

Do consultees agree?

Number of responses

11.33 Total: 26 (25 in agreement, 1 in disagreement).

Responses in agreement (without further comment)

11.34 Institution of Civil Engineers Wales; Allan Archer; Caerphilly CBC; POSW South East Wales; Cardiff Council; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire CC; PINS; Chartered Institute for Archaeologists; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Huw Williams (Geldards)

Responses in agreement (with additional comment)

11.35 *Carmarthenshire CC*: Agreed. This refers to enforcement notices, listed building and conservation area consent etc.

11.36 *Theatres Trust*: The Trust agrees with this proposal. Applications for listed building consent, conservation area consent and other such works must be treated with equal significance to any other application.

11.37 *RTPI*: This would bring clarity and consistency, subject to the comments made at 11.3.

11.38 *Rhondda Cynon Taf CBC*: Agreed - the changes previously proposed should also apply to these types of appeal.

Responses disagreeing

11.39 *Country Land and Business Association*: No. Need to be able to keep existing flexibility.

CONSULTATION QUESTION 11-5.

We provisionally propose that the legislation should state that, in a case where there has been an appeal to the Welsh Ministers, the start of the period within which a purchase notice can be served is the date of the decision of the Welsh Ministers on the appeal. Do consultees agree?

Number of responses

11.40 Total: 25 (21 in agreement, 4 in agreement subject to conditions).

Responses in agreement (without further comment)

11.41 Institution of Civil Engineers Wales; Allan Archer; Caerphilly CBC, POSW South East Wales; Cardiff Council; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CC; RTPI; Bridgend CBC; Keith Bush; PEBA; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Responses (subject to conditions)

11.42 *Lawyers in Local Government & Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services*: Agreed in order to clarify. However, there is a question as to what use (if any) is made of Purchase Notices within the system in Wales and what value they add.

11.43 *Pembrey and Burry Port Town Council*: The Committee agreed that there was no need to restate sections 249 and 250 of the TCPA 1990 but felt there should be clarification as to whether or not the term Welsh Ministers included Members of Parliament such as the Secretary of State for Wales.

CONSULTATION QUESTION 11-6.

We provisionally propose that the Planning Bill should clarify that a purchase notice may not be amended, but that a second or subsequent notice served in relation to a single decision should be deemed to supersede any earlier such notice. Do consultees agree?

Number of responses

11.44 Total: 23 (20 in agreement, 3 in agreement subject to conditions).

Responses in agreement (without further comment)

11.45 Caerphilly CBC; POSW South East Wales; Cardiff Council; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CC; RTPI; Bridgend CBC; Keith Bush; PEBA; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

11.46 *Allan Archer*: I agree that this clarification, following the Court of Appeal decision referred to in 11.56, would also be helpful.

Responses in agreement (subject to conditions)

11.47 *Barry Town Council*: Agree, subject to correct records being kept of any amendments made.

11.48 *Lawyers in Local Government & Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services*: Again, agreed in order to clarify.

CONSULTATION QUESTION 11-7.

We provisionally consider that it would not be appropriate to bring together the powers currently in section 247, 248, 253 to 257 of the TCPA 1990 (relating to highways affected by development) and those in section 116, 118 and 119 of the Highways Act 1980. Do consultees agree?

Number of responses

11.49 Total: 23 (20 in agreement, 3 in disagreement).

Responses in agreement (without further comment)

11.50 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Cardiff Council; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Newport CC; Torfaen CBC; Bridgend CBC; Lawyers in Local Government; PEBA; Mineral Products Association; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

11.51 *Allan Archer*: Since, as explained in 11.63, these provisions perform substantially different functions, I think the conclusion not to combine them is the right one.

11.52 *PINS*: Yes. Town and country planning is a very broad field. It will not be possible or practicable to combine every related power.

11.53 *Home Builders Federation:* The HBF supports the proposal not to bring together the various pieces of highway legislation as they currently provide flexibility to use the most appropriate method.

11.54 *Neath Port Talbot*: Agreed. Consideration also needs to be given to fast tracking this process as it takes a very long period of time to stop up a highway.

11.55 *RTPI:* We agree, each covers separate requirements.

11.56 *Keith Bush*: Agree – powers relating to highways are the ones which, if the chance arose in the future, should move from the planning laws to highways laws.

Responses disagreeing (with additional comment)

11.57 *Redrow Homes*: Redrow would support any mechanism to consolidate and shorten the process for stopping up or diversion of a highway. A planning permission simply agreeing this would be beneficial.

11.58 *The Law Society & Huw Williams (Geldards)*: We disagree. We have known cases where applications have been made to the Magistrates Courts for stopping up of highways to allow development to take place in the belief that it will be quicker than proceeding under the TCPA.

A notorious example which I was involved in was when the Millennium Commission, as a condition of funding the National Botanic Garden of Wales project at Middleton Hall in Carmarthenshire required the trustees to proceed under section 116 of the 1980 Act to close former estate roads that had become adopted highways when the estate had passed into the hands of the local authority and was split into smallholdings. An inexperienced Carmarthen Bench and their legal adviser, all equally unversed in the intricacies of highway planning declined to make an order and the matter was only rectified by the Crown Court on the day before the funding offer ran out.

Accordingly, we suggest that where applications are to facilitate development they should have to proceed under the T&CPA which will ensure that objections are dealt with by PINS who have the appropriate skills to consider highways matters. This is consistent with the recent reform in Wales of section 215 notices (referred to in paragraph 16.23 of the Consultation Paper) which has transferred appeals against such notices from the Magistrates Court to PINS.

CONSULTATION QUESTION 11-8.

We provisionally propose that sections 249 and 250 of the TCPA 1990 (relating to orders extinguishing the right to use vehicles on a highway, in conjunction with a proposal for the improvement of the amenity of an area) be not restated in the Bill, in view of the parallel provisions in section 1 of the Road Traffic Regulation Act 1984. Do consultees agree?

Number of responses

11.59 Total: 24 (24 in agreement).

Responses in agreement (without further comment)

11.60 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Cardiff Council; Merthyr Tudfil CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CC; Bridgend CBC; Lawyers in

Local Government; Keith Bush; PEBA; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

11.61 *Allan Archer*: I think, as explained in this section, that the powers of the Road Traffic Regulation Act 1984 have some advantages over the TCPA 1990 powers and on that basis I support the proposal that s249 and s250 should not be restated in the Bill.

11.62 *Country Land and Business Association*: Yes in theory. These are two different regulatory regimes.

11.63 *Blaenau Gwent CBC*: Agree although in our experience we find developers prefer to use the TCPA as the provisions are processes are easier.

11.64 *Carmarthenshire CC*: Repetition re orders extinguishing the right of use of vehicles on a highway in conjunction with a proposals for improvement of the amenity of an area not needed (covered by Road Traffic Act 1984

11.65 *RTPI*: Agree, these provisions are appropriately covered in the 1984 Act

CONSULTATION QUESTION 11-9.

We provisionally propose that decisions relating to orders under section 252 of the TCPA 1990 (extinguishing rights of way) be generally made by inspectors rather than by the Welsh Ministers, subject to a power for the Welsh Ministers to make a direction to recover a particular case for their decision. Do consultees agree?

Number of responses

11.66 Total: 24 (24 in agreement).

Responses in agreement (without further comment)

11.67 Institution of Civil Engineers Wales; Allan Archer; Caerphilly CBC; POSW South East Wales; Cardiff Council; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Theatres Trust; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CC; RTPI; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

11.68 *The Law Society & Huw Williams (Geldards)*: We agree to determination by Inspector with a power for the Minister to recover jurisdiction either in individual cases or specified kinds of case, should be the default position

CHAPER 11: GENERAL COMMENTS

11.69 *National Grid:* Although National Grid's use of the appeal system is rare, the technical revisions proposed make sense and fit well with the simplification of Welsh Planning. [11-1 - 11-3, 11-5].

11.70 *Mineral Products Association:* Paragraph 11.29 makes reference to the payment of fees for appeals. Whilst we acknowledge that Ministers have powers to introduce these but have yet to make regulations to this end, we believe that, with the exception of enforcement appeals, this should be withdrawn from the legislation and not included in the Bill. Planning fees accompanying planning applications, do more than simply recover the costs of the application. Significant increases in planning fees over the past decade have failed to deliver improvements in the planning service upon which the increase in fees were routinely sold. The right of appeal should be part of the overall determination process and should not attract further fees from an applicant. Further, costs associated with a determination by members against officer recommendation, should attract mandatory fee recovery for the appellant.

11.71 *Arup:* The complexity of the planning system will inevitably lead to inconsistent application amongst local planning authorities. With the onset of formal pre-application consultation requirements in conjunction with the standard determination period, for most planning applications there will be sufficient scope to negotiate on the acceptability of key matters and establish an approach towards planning consent being granted.

The existing planning appeal process provides a mechanism for addressing complex issues that could not be overcome during a planning application's determination. However, there are aspects of a planning application's determination that are not so complex and need an appeals process that is commensurate to the consequences of decision making. Such an approach has been created in the context of a planning application's validation, where there is a much more expedient appeals process. Although this appeals process has not been widely used the effects of its existence have been tangible. Local planning authorities that traditionally employ quite onerous validation processes have since become much more receptive when negotiating on points of contention, coinciding with the fact they can be made more accountable for their actions.

It is proposed that similar benefits could be achieved in relation to planning conditions. As touched upon earlier, local planning authorities in Wales do not provide early enough draft planning conditions as a matter of course and even after detailed negotiations on what planning conditions could or should be attached to a decision notice there are still cases where unreasonable planning conditions are forthcoming. Once a decision notice has been issued with those planning conditions attached, the only option an applicant has at its disposal is to apply under Section 73 of the TCPA to vary the terms of the condition or refer the decision to the Planning Inspectorate on appeal.

These options are not commensurate with the complexity of the issue or consequences of the decision making in the context of planning conditions and are not readily utilised by applicants because they are onerous. In conjunction with provisions regulating how planning conditions are treated during the determination

process, an expedient appeals process would ensure a more efficient and appropriate use of planning conditions.

11.72 *Friends of the Earth Cymru:* We recommend the Law Commission look carefully at the option of proposing a limited community (third) party right of appeal to rebalance the system. Given that private interests are able to appeal the decisions of planning authorities, it is broadly unfair that communities do not enjoy a set of similar but limited rights for matters of public interest. In simplifying the existing code, the Law Commission should also consider the balance of power and access to influence the outcomes of decisions in delivering a fairer, more equitable Planning code for Wales.

11.73 *Bay of Colwyn Town Council:* The Council feels that the Law Commission should take this opportunity to introduce Third Party Rights of Appeal (TPRA) to the Planning Inspectorate as part of Planning Law In Wales. The report on the Law Commission's Consultation Paper on Planning Law in Wales by a member of the General Purpose and Planning Committee included: I have been lucky to have some senior Planning Officers serving on my rural Community Councils now and in the past

One wrote: I agree that TPRA to the Planning Inspectorate should be considered. Such rights already exist in the Republic of Ireland and is due to be introduced in Scotland, I believe.

Geraint Ellis, in the Introduction to his paper *Third Party Appeals: Pragmatism and Principle* published in the *Journal of Planning Theory and Practice*, Vol. 7 No. 3, states: Yet the appeals process highlights a curious contradiction. On the one hand we have dominant normative principles that suggest that "good planning arises from enhanced public participation, community engagement and collaborative discourse, yet in many planning systems, including Britain, the critical mechanism of having a right to appeal is denied to everybody except the developer (the first party). In effect, this prioritises the interests of one group of stakeholders in the planning process over all others.

And

A significant impetus for this debate has been an implicit threat that the absence of TPRA may be contrary to the European Convention of Human Rights and the Aarhus Convention.

and

In his section *TPRA in Practice – Evidence from the Republic of Ireland*, Geraint Ellis states: When the Republic of Ireland introduced its comprehensive planning system ... the 1963 Act introduced an unrestricted right of appeal, with the Minister of the time stressing that "every interested person would have a right of appeal "if anything… leaning over backwards for the benefit of the public (quoted in Crow 1995, p.382).

Figure 1, on page 3, shows that third party appeals now make up 54% of all appeals. See http: //www.rtpi.org.uk/media/10012/GE-Third-party-appeals-Planning-Theory-and-Practice.pdf

Chapter 12: Unauthorised development

CONSULTATION QUESTION 12-1.

We provisionally consider that the provisions currently in sections 171C and 330 of the TCPA 1990 could be conflated into a single power for the Welsh Ministers or a planning authority to serve a "planning information notice" on the owner and occupier of land or any person who is carrying out operations or other activities on the land or is using it for any purpose, requiring the recipient to supply information as to:

(a) the interest in the land held by the recipient of the notice and by any other person of whom the recipient is aware;

(b) the use or uses of the land and when they began; and

(c) the operations and other activities now taking place of the land and when they began.

Where it appears that there has been a breach of planning control, such a notice may also:

(d) require the recipient to supply information as to:

- **whether any uses or operations specified in the notice are being or have been carried out on the land;**
- **any person known to be using or have used the land or carried out any operations on it;**
- **any planning permission that may have been granted, and any conditions or limitations attached to such a permission; or**
- **any reasons why permission is not required for any particular use or operation; and**

(e) request a meeting at which the recipient can discuss the matters referred to in the notice.

Do consultees agree?

Number of responses

12.2 Total: 33 (27 in agreement, 1 in agreement subject to conditions, 4 in disagreement, and 1 other comment)

Responses in agreement (without further comment)

12.3 Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Carmarthenshire CC; Ceredigion CC; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law

Society; Neath Port Talbot CBC; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Pembrey and Burry Port Town Council.

Responses in agreement (with additional comment)

12.4 *Lawyers in Local Government & Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services*: Yes. There doesn't appear to be anything missing from the single power that is currently contained in the two existing powers.

12.5 *Theatres Trust*: The Trust agrees that a single procedure would bring simplification and clarity to the Welsh planning system.

12.6 *Bridgend CBC*: Yes. The serving of a planning information notice should constitute enforcement so that the time limits run from the service of such a notice. This provision would apply from the first service of such a notice so the LPA cannot renew time limits indefinitely by serving a notice.

12.7 *Rhondda Cynon Taf CBC*: Agree with the proposed single power. Yes it would be simpler if the two Sections were combined to create one notice. Separate provisions exist under Section 16 of the Local Government (Miscellaneous Provisions) Act 1976, if confirmation is solely required to obtain ownership of property or any other persons with an interest in the land.

12.8 *Liam Jones, NAPE*: Agree with a single power to streamline and prevent duplication. Should be noted that under Section 16 of the Local Government (Miscellaneous Provisions) Act 1976 Councils have powers to require details of interest in land also. Whilst noting the supporting text of the consultation document about the potentially intrusive nature of a PCN it should be noted that when seeking a prosecution for failing to supply the relevant information through the courts the courts will often ask for the Date of Birth of the offender. Clearly without requesting this information on the notice then LPAs may have difficulty actually prosecuting someone for failing to return a PCN (Planning Information Notice).

Responses in agreement (subject to conditions)

12.9 *Pembrokeshire Coast NPA & National Parks Wales*: Agree with the proposed single power, however, the Authority considers that (4) & (5) should be included with all 'Planning Information Notices' as answers to these questions can assist a LPA in establishing whether a breach has occurred or not.

Responses disagreeing

12.10 *Allan Archer*: On the basis that the combining of s171C and s330 provisions cover all the requirements of the existing separate provisions, I understand the rationale behind this proposal. However, I wonder if the proposal fully incorporates the information requirements of s330(2)(e) and I would be concerned if the new provisions reduced the scope of the existing provisions or the effectiveness of planning authority's investigative powers since PCNs are a much used and successful tool. Further, one of the benefits of the s171C provisions is that it sits in the Enforcement section of the Act and is called a Planning Contravention Notice which clearly highlights for the recipient the nature of the planning authority's interest

and the possibility of future enforcement action – I'd suggest that it would be beneficial if these advantages were not lost in the placement of this new provision in the Code and the naming and wording of the notice served in cases which correspond to those subject currently to s171C.

12.11 *Richard White, Newport CC*: If unauthorised development is being carried out the first move of the Planning Authority should be that a stop notice can be issued immediately to stop the works immediately and that noncompliance would be a criminal offence. A planning application could then be submitted for consideration. There should be no costs or right of appeal against the stop notice if the application is granted or refused. An appeal to the planning inspectorate could be made as now if the application is refused.

Reason:- To give enforcement officers more powers to stop the destruction of land particularly in the Green Belt and Open` Countryside or areas of special importance such as Historical Landscapes, SSSI's and Conversation Areas. Land on which unlawful development has taken place is rarely returned to its original condition and can remain an eyesore for generations and the time officers have to spend on trying to achieve this is wasteful.

12.12 *Blaenau Gwent CBC:* Agree with the principle of one notice but in our experience, the PCN is an effective tool which carries added gravitas and importance implied by the name. Changing to "Planning Information Notice" might result in the recipient not affording the notice the attention it requires.

12.13 *RTPI:* In principle, we consider there is scope to amalgamate these two provisions together. However, it would be useful to have further details as to how this will be achieved. Currently the Planning Contravention Notice is an effective tool to gather useful information about how land is being used, in order to assess whether there is a breach of planning control. We would not like to see this procedure restricted by the use of standard prescribed questions. Would this provision extend to listed building issues.

Other comments

12.14 *Newtown and Llanllwchaiarn Town Council:* In part. Town council would like to see enforcement regimes strengthened and giver adequate resourcing so that unauthorised developments become established for the lack of resource and undermine the planning system (and confidence in it) as a consequence.

CONSULTATION QUESTION 12-2.

We provisionally propose that the restriction on entering property for enforcement purposes only after giving 24 hours' notice, currently in section 196A(4) of the TCPA 1990, should be clarified to ensure that it applies in relation to all property in use as a dwelling. Do consultees agree?

Number of responses

12.15 Total: 30 (30 in agreement).

Responses in agreement (without further comment)

12.16 Pembrokeshire Coast NPA; National Parks Wales; Allan Archer; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards)

Responses in agreement (with additional comment)

12.17 *RTPI*: This clarification would be useful.

12.18 *Richard White, Newport CC*: Agree. It should also state clearly that it applies to any land surrounding the "dwelling" The term dwelling should also include a mobile home / caravan or associated buildings used in connection with the dwelling.

12.19 *Rhondda Cynon Taf CBC*: Agree clarification is required in terms of defining a dwelling house.

12.20 *Liam Jones, NAPE*: Agree this is appropriate

CONSULTATION QUESTION 12-3.

We provisionally consider that the law as to concealed breaches of planning control should remain as it is, subject to the common law principles developed *Welwyn Hatfield Council v Secretary of State* [2010] UKSC 15, [2011] 2 AC 304, and in particular that the "planning enforcement order" procedure, introduced by the Localism Act 2011, should not be included in the Bill. Do consultees agree?

Number of responses

12.21 Total: 30 (27 in agreement, 2 equivocal responses and 1 in disagreement).

Responses in agreement (without further comment)

12.22 Pembrey and Burry Port Town Council; Pembrokeshire CC; Newport CC; Torfaen CBC; The Law Society; Bridgend CBC; Keith Bush; Cardiff Council; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC

Responses in agreement (with additional comment)

12.23 *POSW; Monmouthshire CC; Ceredigion CC; Neath Port Talbot CBC; Pembrokeshire Coast NPA & National Parks Wales*: It would be helpful for both LPAs and

landowners if this was included in the law, once there has been sufficient consideration in the courts.

12.24 *Richard White, Newport CC*: Concealed breaches of planning should not have any time limit after which they become lawful but should be subject to enforcement at any time.

12.25 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government*: Yes. However another issue that was discussed in the Welwyn Hatfield was that the immunity period of 4 years applies to the change of use of a building (or part of a building) to use as a dwelling house. However, if there has been no change of use (i.e. the building has been constructed and used for no other purpose before ultimately being used as a dwelling) then the immunity period is 10 years. Notwithstanding the clarity provided in Welwyn Hatfield this issue appears to have continued to cause confusion in our experience. Is it therefore worth making this absolutely clear (we appreciate that it is intended to deal with time limits in the part of the Bill dealing with the need for planning permission generally) where the time limits to immunity from enforcement action are dealt with?

12.26 *PINS*: Agree but suggest that in the interests of clarity that consideration is given to including a specific cross-reference to the common law principles within the Bill.

12.27 *RTPI*: We agree with the principles of the report relating to the law and concealed breaches of planning control. If such a case is identified than reliance can be placed on the Welwyn principle. Therefore, we see little point in introducing the 'planning enforcement order' procedure into the Bill.

12.28 *UK Environmental Law Association*: We believe that the common law principles acknowledged in Welwyn Hatfield should be included on the face of the Bill to ensure transparency in this important area. However, we agree that there is no need to introduce a specific "planning enforcement order" procedure.

12.29 *Rhondda Cynon Taf CBC*: Agree that the law as to concealed breaches of planning control should remain as it is.

12.30 *Liam Jones, NAPE*: Agree that the PEO procedure will be problematic if introduced in Wales but that there must be a mechanism to deal with concealed breaches of planning control.

Equivocal responses

12.31 *Allan Archer:* I think that the issue of concealment is a difficult one and that the Welwyn principle has been helpful. However, there still seems to me to be some lack of clarity over the concepts of development being 'deliberately concealed' and what is a 'particularly serious case'. Consequently, some clarity, legislative or otherwise, would be helpful to all. Whether sections 171BA to 171BC are adequate seems not yet certain but I would favour some provision which overcomes the problems indicated in 12.30 and 12.31.

12.32 *PEBA:* We consider that there should be a single statutory procedure, whether that procedure be based on the current statutory system or the common law as stated in

Welwyn Hatfield. The current position is confusing and unhelpful in a field, planning enforcement, where clarity is a vital element. On balance, the most obvious solution is to codify the Welwyn principles.

Responses disagreeing

12.33 *Institute of Historic Building Conservation*: In relation to Question 12.3, the IHBC oppose the proposal to remove the Planning Enforcement Order, unless the removal of time limits for enforcement proposed in Q13.7 is applied not just to 'heritage development' (i.e. demolition in Conservation Areas) but also any other development in conservation areas and World Heritage Sites. An alternative remedy to the concerns about Planning Enforcement Orders would be to provide for them in the new bill, but with clarification on those areas of concern, i.e placing a limit on the time extension for which LPAs can apply, and a facility to challenge the certificate issued by the LPA as to the date on which the breach came to its attention. Lack of training for magistrates is hardly a reason for weakening the law.

CONSULTATION QUESTION 12-4.

We provisionally propose either:

(1) **that an enforcement warning notice can be served during the period of 4 or 10 years after which enforcement action cannot be taken, but that the service of such a notice does not extend that period; or**

(2) **that where an enforcement warning notice has been served, the period for taking other enforcement action starts on the date on which the notice was served.**

Do consultees agree and, if so, which option seems most appropriate?

Number of responses

12.34 Total: 32 (4 in general agreement, 6 in favour of Option 1, 21 in favour of Option 2, and 1 equivocal).

Responses in agreement

12.35 Pembrokeshire CC; Keith Bush; Cardiff Council

12.36 *Pembrey and Burry Port Town Council*: The Committee agreed that it would be helpful for enforcement notices to specify the purposes of the steps it requires.

Responses agreeing and calling for Option 1

12.37 Country Land and Business Association; Rhondda Cynon Taf CBC

12.38 *Mineral Products Association*: we support the proposals to ensure breaches of planning control are not extended indefinitely and support option (1).

12.39 *Caerphilly CBC and POSW South East Wales*: Option (1) seems most appropriate. The 4- and 10-year periods are well established, and subject to the Welwyn principle, reasonable time limits during which the gravity and impact of any unauthorised development can be assessed.

12.40 *Central Association of Agricultural Valuers*: We do not believe that an enforcement warning notice should extend beyond the enforcement period and therefore prefer option one. The use of property requires certainty.

Responses agreeing and calling for Option 2

12.41 Newport CC; PEBA; Merthyr Tudfil CBC

12.42 *Barry Town Council*: Agree, and consider option 2 "that where an enforcement warning notice has been served, the period for taking other enforcement action starts on the date on which the notice was served".

12.43 *POSW; Monmouthshire CC; Ceredigion CC; Neath Port Talbot CBC; Pembrokeshire Coast NPA & National Parks Wales*: Option 2 is the most clear, practical and appropriate option.

12.44 *Allan Archer*: I agree that it seems wrong that the period for taking enforcement action can be extended indefinitely through the service of repeated notices and that some amendment to s173ZA is justified. To be consistent with other provisions mentioned I feel option (2) would be more appropriate.

12.45 *Carmarthenshire CC*: Option 2 is the most clear, practical and appropriate option. This provides far more clarity re timescales in relation to once an Enforcement Warning notice has been issued.

12.46 *Torfaen CBC*: Option (1) would not be helpful in situations where a breach is nearing immunity. If the service of a EWN does not buy extra time then officers may be forced to serve an enforcement notice to stop the immunity clock ticking when the breach could be resolved through the service of an EWN and the subsequent grant of planning permission subject to conditions. Option (2) gives a 4 year safety net in which to take further enforcement action (if necessary) following the issue of a EWN which is welcomed. However, it would also be important to ensure that option (2) didn't remove the 4 year 'second bite' provision that currently exists following the service of an enforcement notice. For example, if an enforcement notice is served within the 4 year period following the service of the EWN, but the enforcement notice is then subsequently found to be defective at appeal, then it would be important to retain the right to issue a new corrected enforcement notice within a 4 year period.

12.47 *Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government*: Option 2 would be preferable from the point of view of an LPA seeking to enforce against unacceptable development, although the effect of it would potentially be to extend the period for enforcement from the date of the initial breach from 4 to almost 8 years or from 10 to almost 20 years for a change of use. However, this is not such a different position from the second bite provisions that apply anyway. The benefit would be that the period of time for further enforcement, once the warning notice has been served (and given the warning notice invites a planning application),

would be certain for both the LPA and the person who is alleged to be in breach of planning control.

12.48 *PINS*: Agree – prefer option (2) in order to allow time to purse an enforcement warning notice in circumstances where the immunity period is close to being reached.

12.49 *The Law Society & Huw Williams (Geldards)*: We agree and consider (b) the most appropriate option. Option (a) has potential practical difficulties if a warning notice was served towards the end of the four or ten-year period, the time limit could pass while a planning application was awaited or being determined.

12.50 *RTPI*: We do not believe Enforcement Warning Notices (EWN) to be widely served. We are not aware of the current procedure being problematic in terms of an LPA being able to extend the time for other forms of enforcement action simply by serving an EWN. Is this proposal attempting to deal with a potential loophole that has been identified? Option 2 would appear more sensible as it would give a specific date, from which to gauge relevant time periods.

12.51 *Bridgend CBC*: Yes. Option 2 is favoured in that it should only extend the time once. The service of an EWN would only occur where the LPA considers the unauthorised development/works/activity to be acceptable subject to conditions.

12.52 *Liam Jones, NAPE*: Agree this is a relatively new area of planning control but that option (2) presented is the most appropriate. It is then clear to all that the date of service of an EWN commences the 4 or 10 years.

Equivocal responses

12.53 *Blaenau Gwent CBC*: Option 2 would introduce a completely new deadline for action which might seem advantageous to the LPA but might be confusing and contradictory to well established enforcement principles.

CONSULTATION QUESTION 12-5.

We provisionally propose that the restriction on issuing a temporary stop notice, currently in section 171F(1)(a) of the TCPA 1990, should be clarified to ensure that it applies in relation to any dwelling (defined so as to include a house and a flat). Do consultees agree?

Number of responses

12.54 Total: 31 (31 in agreement).

Responses in agreement (without further comment)

12.55 Caerphilly CBC; POSW South East Wales; Pembrokeshire Coast NPA & National Parks Wales; Allan Archer; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath

Port Talbot CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Bridgend CBC; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.56 *Richard White, Newport CC*: Agree. The definition of "dwelling" should include mobile homes, caravans and associated buildings used in connection with the dwelling.

12.57 *Carmarthenshire CC*: Agreed. This makes clear the restriction in relation to all types of dwelling houses.

12.58 *Pembrey and Burry Port Town Council*: The Committee were agreed that there was no purpose served by the reference to a "deemed planning application".

12.59 *RTPI*: This appears logical and would mirror the suggested proposal being considered under question 12-2.

12.60 *Rhondda Cynon Taf CBC*: Agree that there should be clarity to ensure that a temporary stop notice applies in relation to any dwelling (defined so as to include a house and a flat).

CONSULTATION QUESTION 12-6.

We provisionally propose that:

(a) a temporary stop notice (TSN) should come into effect at the time and date stated in it, which will normally be when a notice is displayed on the land in question;

(b) it should then remain in effect for 28 days (starting at the beginning of the day after the day on which it is displayed);

(c) the notice displayed on the land, as near as possible to the place at which the activity to which it relates is occurring, should:

- **state that a TSN has been issued;**
- **summarise the effect of the TSN; and**
- **state the address (and, if applicable, the website) at which a full copy of the TSN can be inspected;**

(d) the authority should have a power (but not a duty) to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate.

Do consultees agree?

Number of responses

12.61 Total: 33 (29 in agreement, 1 in agreement subject to conditions, 1 in disagreement, and 2 others).

Responses in agreement (without further comment)

12.62 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Cardiff Council; Huw Williams (Geldards); Rhondda Cynn Taf CBC; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.63 *Allan Archer*: I think these minor variations would provide clarification of the issues identified and should be supported.

12.64 *Carmarthenshire CC*: Agreed. The text helps explain the use of Temp stop notices.

12.65 *Pembrey and Burry Port Town Council*: The Committee were agreed that this provision would make stop notices more effective.

12.66 *Home Builders Federation*: The HBF suggests that the requirement to serve the notice on the owner, if known, should be a requirement 'duty' as it is the owner who is required to respond to the notice.

12.67 *RTPI:* The proposed provisions appear to address only minor variations and we consider them to be acceptable.

Responses in agreement (subject to conditions)

12.68 *PEBA:* Yes but with the caveat that it is important to avoid circumstances in which an occupier/landowner could become aware of a temporary stop notice before it has been displayed on the land. Any time gap could allow an occupier/landowner to carry out breaches of planning control, such as bringing residential caravans onto the land, without criminal sanction. It is agreed that the authority should have a power rather than a duty to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate.

Responses disagreeing

12.69 *Richard White, Newport CC*: The Temporary stop notice should stay in force until planning permission is granted, not just for 28 days. Ownership of some land is difficult to ascertain particularly when it is not registered. It should be sufficient to post notices on the land or hand to the people carrying out the unauthorised works.

Other comments

12.70 *Country Land and Business Association*: Para 12.52 refers to the TSN remaining in effect "until the end of…." But the text in question 12-6 makes no mention of "until the end of….". We suggest that the text going forward must reflect "until the end of…".

12.71 *Canal & River Trust*: In relation to point 4 we consider that any formal notice should always be served on both the owner and the occupier.

CONSULTATION QUESTION 12-7.

We provisionally propose that:

(1) **it should be an offence to contravene a temporary stop notice that has come into effect (rather than one that has been served on the accused or displayed on the site);**

(2) **it should be a defence to a charge of such an offence to prove that the accused**

- **had not been served with a copy of the notice; and**
- **did not know, and could not reasonably have been expected to know, of the existence of the notice.**

Do consultees agree?

Number of responses

12.72 Total: 33 (28 in agreement, 2 equivocal, 2 in disagreement and 1 other).

Responses in agreement (without further comment)

12.73 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Rhondda Cynon Taf CBC; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.74 *Allan Archer:* I agree that this would be a sensible variation of the existing provisions.

12.75 *Carmarthenshire CC:* Agreed. The text helps explain the use of Temp stop notices.

12.76 *Pembrey and Burry Port Town Council:* The Committee were agreed that a fine was preferable to a sentence of imprisonment in such cases due to pressures faced by the prison system.

12.77 *RTPI:* Again the proposal appears relatively minor. We consider it to be acceptable.

Equivocal responses

12.78 *Richard White, Newport CC*: Agree with (1). Do not agree with (2)

Responses disagreeing

12.79 *Cynwyl Elfed Community Council*: A prison sentence should be included as a sanction. It is possible for developers to factor in fines to the cost of building in order to allow them to avoid keeping to the rules.

12.80 *Canal & River Trust*: It should be an offence to contravene a temporary stop notice that has been served.

Other comments

12.81 *Glamorgan Gwent Archaeological Trust*: Temporary Stop notices: In view of the proposal to simplify the planning and listed building consent regimes and the provisions for temporary stop notices as provided for in the Historic Environment (Wales) Act 2016, there will need to be some clear procedural advice.

CONSULTATION QUESTION 12-8.

We provisionally propose that the provisions relating to breach of condition notices, currently in section 187A of the TCPA 1990, should be amended so that a notice is to be "issued", to come into force on the date stated in it, with copies being served on those apparently responsible for the breach (rather than, as present, a separate notice being served on each such person, coming into force on a date specified by reference to the date of service). Do consultees agree?

Number of responses

12.82 Total: 31 (31 in agreement).

Responses in agreement (without further comment)

12.83 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Newport CC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Torfaen CBC; Richard White, Newport CC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards)

Responses in agreement (with additional comment)

12.84 *Allan Archer*: I think these minor variations would provide clarification of the issues identified and should be supported.

12.85 *Carmarthenshire CC:* Agreed. The text helps explain the use of Temp stop notices.

12.86 *Mineral Products Association*: we would suggest the inclusion of a right of appeal against a breach of condition notice for specific developments. Some developments may last for many years and circumstance may change. Conditions may therefore become out of date. Indeed, this has been the subject of many changes to legislation associated with mineral developments.

12.87 *The Law Society*: We agree. Also agree the desirability of adopting as far as possible a common approach to the service and coming into effect of notices related to the enforcement of planning control.

12.88 *RTPI:* This proposal appears to be a logical approach.

12.89 *Rhondda Cynon Taf CBC*: Agree this would bring it in line with an enforcement notice against a breach of condition and make it clearer for the recipient if a date is specified when it comes into force.

12.90 *Liam Jones, NAPE*: Agree bringing it in line with enforcement notices would avoid any confusion in relation to different notices being issued.

CONSULTATION QUESTION 12-9.

We provisionally propose that an enforcement notice should be required to specify:

(1) **the steps that the authority requires to be taken, or the activities that are to cease, in order to achieve, wholly or partly, all or any of the purposes set out in section 173(4) of the TCPA 1990; and**

(2) **which one or more of those purposes it considers will be achieved by taking those steps.**

Do consultees agree?

Number of responses

12.91 Total: 31 (21 in agreement, 3 equivocal responses, 7 in disagreement).

Responses in agreement (without further comment)

12.92 Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Blaenau Gwent CBC; Ceredigion CC; Monmouth TC; Pembrokeshire CC; The Law Society; Neath Port CC; Bridgend CBC; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards)

Responses in agreement (with additional comment)

12.93 *Allan Archer*: This should give greater clarity to the requirements of an EN and should be supported.

12.94 *Carmarthenshire CC*: Agreed. The text helps explain the reasoning behind an individual enforcement notice.

12.95 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government*: Yes, whilst is does not introduce any practical difference in terms of the effect of a notice the clarity would be helpful.

12.96 *PINS*: Agree – PINS question whether this would have implications to appealing a notice. Would there be need for clarity over whether an appellant can challenge the stated purpose of issuing the notice, or whether that would remain a matter for the discretion of the LPA.

12.97 *RTPI*: This appears to be an acceptable proposal and will provide clarification to this particular section of an enforcement notice.

12.98 *Rhondda Cynon Taf CBC*: The proposed amendments to section 173(3) will make it clearer as to the requirements that can be specified in an enforcement notice.

Equivocal responses

12.99 *Torfaen CBC*: It is not entirely clear what purpose this would serve. However, at previous enforcement appeals, the question has been raised as to whether the purpose of a particular enforcement notice has been to remedy the breach, or to remedy injury to amenity, as this has been deemed significant in determining an appeal under Ground (f). Appellants often appeal under ground (f) suggesting lesser steps that could be taken to resolve the alleged breach. They often do this to try and retain a development and to avoid appealing under ground (a), thereby avoiding a deemed application fee.

However, Inspectors have pointed out that if the steps required to comply with an enforcement notice effectively have the purpose of remedying the breach (as opposed to just the injury to amenity) then it is not possible for an appellant to claim that the steps exceed what is necessary to remedy the breach, and the appeal under ground (f) therefore fails. If introducing a requirement to specify the purpose of an enforcement notice would help provide clarity regarding the circumstance in which a ground (f) can be pleaded, then this this would be useful.

12.100 *Richard White, Newport CC:* Enforcement notices need to have more weight in law as they appear to be ignored by those intent on abusing the planning laws and procedures.

12.101 *Liam Jones, NAPE*: Can see the benefit of inclusion of the words 'all or any' as set out in (1) but don't consider that LPAs should need to further say which one or more of the purposes it considers will be achieved by taking those steps as set out in (2) – The reasons for serving the enforcement notice will set out why the LPA has taken action.

Responses disagreeing (with additional comment)

12.102 *POSW; Monmouthshire CC; Pembrokeshire Coast NPA & National Parks Wales*: The Authority fails to see what this would add to the enforcement notice.

12.103 *Merthyr Tudfil CBC*: Disagree. What would it achieve?

12.104 *Newport CC*: Allows another challenge. Reasons for issuing the notice are already included.

12.105 *Canal & River Trust*: We seek further clarity on the proposals but initially suggest that they would not be helpful to anyone who is served with an Enforcement notice.

CONSULTATION QUESTION 12-10.

We provisionally propose that there should be an explicit provision in the Bill, incorporating the principle in *Murfitt v Secretary of State* and subsequent cases, to the effect that, where an enforcement notice is served alleging the making of a material change of use of land, the notice may require that certain works be removed in addition to the cessation of the unauthorised use, provided that those works were integral to the making of the material change of use. Do consultees agree?

Number of responses

12.106 Total: 28 (28 in agreement).

Responses in agreement (without further comment)

12.107 Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Monmouth TC; Pembrokeshire CC; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; RTPI; Bridgend CBC; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Liam Jones, NAPE

Responses in agreement (with additional comment)

12.108 *POSW; Monmouthshire CC; Ceredigion CC; Pembrokeshire Coast NPA & National Parks Wales*: Agree and welcome this inclusion

12.109 *Carmarthenshire CC*: Agreed. The text helps explain the reasoning behind an individual enforcement notice.

12.110 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services & Lawyers in Local Government*: Yes, we agree with incorporating the principle of the cases into the Bill. Wording wise though, should it be “integral” or should it be “operational development that has facilitated the change of use”, thereby capturing anything that relates to the use, including ancillary operational development, as well as more integral operational development?

12.111 *PINS*: Agree, but suggest that rather than the works being ‘integral to the making’ of the change that the works are ‘integral to the making or subsequent operation’ of the material change of use. This would avoid works that are undertaken to consolidate or intensify the use in question after the date of the initial material change of use from falling outside the scope of the proposed amendment.

12.112 *Rhondda Cynon Taf CBC:* Agree and it would provide clarity to the recipient of an enforcement notice.

CONSULTATION QUESTION 12-11.

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

Number of responses

12.113 Total: 29 (22 in agreement, 3 equivocal responses, 3 in disagreement).

Responses in agreement (without further comment)

12.114 Pembrokeshire Coast NPA; National Parks Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Ceredigion CC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Allan Archer; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.115 *Carmarthenshire CC*: Agreed. Helps explain that works that would not have required planning permission can be undertaken despite the notice being in place.

12.116 *Newport CC*: Yes providing this is a standardised statement.

12.117 *RTPI*: We agree with this proposal, as this situation often arises during enforcement notice appeals. However, the drafting of the note is an important factor, to ensure it is fully understood by the recipient.

12.118 *Rhondda Cynon Taf CBC*: Agree and it would provide clarity to the recipient of an enforcement notice.

Equivocal responses

12.119 *Cardiff Council*: A simple explanatory note may be useful but it should not confuse the recipient of the Notice to the effect that a previous use may continue on land which could also be unauthorised.

12.120 *Blaenau Gwent CBC*: If this is required to comply with a principle established through case law then I would not object. However, it does seem to confuse matters when the purpose of the notice is to rectify a breach and at the same time, the notice advises on what development can be carried out without a planning application. The issues should be separated to avoid mixed messages

12.121 *PEBA*: Yes, the statutory encapsulation of the Mansi principle will require careful consideration. we also suggest that the Commission consider operational development associated with unauthorised changes of use which may include things (such as fences) which are covered by Permitted Development Rights, but are nevertheless caught by an enforcement notice if the only reason for their existence is their association with the unauthorised change of use. The effect of the enforcement notice should not be to remove the PDR.

Responses disagreeing

12.122 *Caerphilly CBC & POSW South East Wales*: No because this may make the notice, which is complex enough for members of the public, more confusing. Also, one of the grounds of appeal against an enforcement notice is that the development does not need planning permission, and some perpetrators would use the proposed statement as a vindication of their activities, i.e. 'the notice says I can do what I'm doing because it's lawful'. That would be easily countered but would be an unnecessary complication. Also, if another principle is established through the courts, should that also be addressed on the notice?

12.123 *Torfaen CBC*: No, for three reasons:

1. The recipient of a notice would then expect the LPA to tell them what they could have done without the need for planning permission, (i.e. make a decision regarding the lawfulness of an activity/operation) which is an additional burden. If a person wants clarification regarding the lawfulness of an activity/operation then they should submit an LDC application.

2. If an LPA advises the recipient of a notice what development could have been carried out immediately prior to the issue of the notice, then this would effectively provide them with a 'fallback' position to argue at an appeal. This 'fallback' position may in turn be afforded more weight by an appeal Inspector.

3. If a LPA refuses to provide specific advice regarding what development could have been carried out immediately prior to the issue of the notice, then the recipient of a Notice could accuse the LPA o`f being unhelpful, and this could lead to the matter being raised with Councillors/MP's/AM's/Magistrates etc which would generate additional work and could potentially influence the outcome of a prosecution.

CONSULTATION QUESTION 12-12.

We provisionally propose that the Bill:

(1) **should omit section 177(5) and (6) of the TCPA 1990, relating to the application for planning permission deemed to have been made by an appellant relying on ground (a) in section 174(2) (permission ought to be granted for any matter stated in the enforcement notice as constituting a breach of control); and**

(2) **should provide instead that the Welsh Ministers on determining an appeal including ground (a) may do all or any of the following:**

- **grant planning permission for any or all of the matters that are alleged to have constitutes a breach of control;**
- **discharge the condition that is alleged to have been breached; or**
- **issue a certificate of lawfulness, insofar as they determine that the matters alleged by the notice to constitute a breach of control were in fact lawful.**

Do consultees agree?

Number of responses

12.124 Total: 28 (23 in agreement, 3 equivocal responses, 2 in disagreement).

Responses in agreement (without further comment)

12.125 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Newport CC

Responses in agreement (with additional comment)

12.126 *Allan Archer*: Accepting the arguments set out in paras 12.95 to 12.98, the proposals would improve the legislation and should be supported.

12.127 *Carmarthenshire CC*: Agreed. Their role in dealing with an appeal is clarified.

12.128 *PEBA*: Yes. It is noted that it is not proposed to remove the requirement to pay a fee, as if a planning application is being made.

12.129 *The Law Society & Huw Williams (Geldards)*: Agree, this would be a welcome simplification.

12.130 *Rhondda Cynon Taf CBC*: Agree that it would be more straightforward and it would simplify the process. Section 177(5) and (6) of the TCPA 1990.

12.131 *Liam Jones, NAPE*: Agree that an appellant should specify at the start if they are relying on a ground (a) appeal and it should not be taken as deemed.

Equivocal responses

12.132 *PINS*: PINS agrees with proposal (1) and with (2) in principle. In relation to the latter suggest it would be clearer to limit the scope of Welsh Ministers on determining an appeal including ground (a) to those elements of the alleged breach that are the subject of the ground (a) appeal rather than any or all of the matters alleged. This would avoid the need to consider the planning merits of any matters alleged in the

breach but which have not been raised by the appellant (and upon which the LPA would not have provided comment).

In the interest of clarity it would need to be made clear that the case for lawfulness would need to be pleaded under one or more of` the legal grounds of appeal, but that a certificate would only be issued if there was also a ground (a) appeal.

12.133 *Torfaen CBC*: Agree with point (1) and point (2), except with regard to the issue of a certificate of lawfulness. This is in line with the position TCBC take in respect of consultation question 7-12. In terms of an enforcement appeal, it is already possible to appeal under ground (c) and (d), and pay for an LDC so there would be no need to include such a provision.

12.134 *RTPI*: This proposal, on the face of it, appears acceptable. There appears to be no requirement for section 177(5) and section 177(6), especially if section 177(1) (a) can be amended accordingly.

Responses disagreeing

12.135 *Country Land and Business Association*: No. Ground (a) must be retained. Losing ground (a) might lead to more appeals and conflicts between local aspirations and national policy. It is unclear that removing ground (a) will provide simplification.

12.136 *Richard White, Newport City Council*: Could this lead to abuse of the system and developments which should not have happened being granted permission? If so it should not be included.

CONSULTATION QUESTION 12-13.

We provisionally consider that ground (e) on which an appeal can be nade against an enforcement notice (under section 174 of the TCPA 1990) should refer to copies of the notice not having been served as required by section 172(2) (which refers to service on owners and occupiers etc) rather than as required by section 172 (which also refers to time limits for service). Do consultees agree?

Number of responses

12.137 Total: 27 (26 in agreement, 1 in disagreement).

Responses in agreement (without further comment)

12.138 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; PINS; Newport CC; Neath Port Talbot CBC; RTPI; Bridgend CBC; Keith Bush; PEBA; Cardiff Council; Lawyers in Local Government; Rhondda Cynon Taf CBC; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.139 *Allan Archer*: I agree this is a sensible amendment to include as part of a consolidation exercise.

Responses disagreeing

12.140 *Torfaen CBC*: Disagree. If specifying that an appeal under ground (e) can only be brought with reference to Section 172(2), then this would enable an appeal against failing to comply with Section 172(3) to be made to the Courts. If this were the case then a notice could be appealed under ground (e) (but jus`t in relation to Section 172(2)), and the Notice could be upheld. Then following non-compliance with the notice, the transgressor could be taken to court and appeal that the notice was not served within the specified time frames and get the notice quashed. This would seem an unnecessary waste of time, resources and money for all parties. It would therefore be better to maintain the status quo and allow both Section 172(2) and (3) to be considered by an appeal Inspector.

Although the example provided in the consultation paper was unfortunate, this scenario is unlikely to happen very often. What should have happened in that particular case is that the Inspectorate should have looked at the grounds of appeal (even though the appeal was submitted a day late) and at that point they would have noticed that the notice had been served late and had caused injustice to the appellant. They could have then entertained the appeal rather than have the notice subsequently quashed by the Court. Whilst TCBC would not advocate the acceptance of late appeals by the Planning Inspectorate as routine practice, it would help in situations such as this if some flexibility and pragmatism could be exercised.

CONSULTATION QUESTION 12-14.

We provisionally consider that section 174(4) of the TCPA 1990 (requirements as to the statement to be submitted with appeal against an enforcement notice) should be amended so as not to duplicate the requirements of the relevant secondary legislation. Do consultees agree?

Number of responses

12.141 Total: 25 (25 in agreement).

Responses in agreement (without further comment)

12.142 Pembrokeshire Coast NPA; National Parks Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Cardiff Council; Lawyers in Local Government; Keith Bush; PEBA; Rhondda Cynon Taf CBC; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.143 *Allan Archer*: I support this on the basis that it removes duplication and that secondary legislation is a better place for this sort of detail.

12.144 *Carmarthenshire CC*: Agreed. Change reduces duplication of other legislation.

12.145 *The Law Society & Huw Williams (Geldards)*: We agree section 17(4) is otiose as suggested.

12.146 *RTPI:* This appears to be a relatively minor change and will potentially omit the current duplication taking place.

CONSULTATION QUESTION 12-15.

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

Number of responses

12.147 Total: 29 (29 in agreement).

Responses in agreement (without further comment)

12.148 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; RTPI; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Neath Port Talbot CBC; Rhondda Cynon Taf CBC; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.149 *Allan Archer*: I think this is a helpful and logical clarification and I support the proposal.

12.150 *Carmarthenshire CC*: Agreed. Clarifies appeals process.

12.151 *The Law Society*: We agree.

CONSULTATION QUESTION 12-16.

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

Number of responses

12.152 Total: 30 (30 in agreement).

Responses in agreement (without further comment)

12.153 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Liam Jones, NAPE

Responses in agreement (with additional comment)

12.154 *Allan Archer*: I agree as this maintains consistency with other proposals.

12.155 *Richard White, Newport CC*: Strongly agree that it should apply to any structure, fixed or mobile, used as a dwelling house or any building used in association with such use.

12.156 *Carmarthenshire CC*: Agreed. This makes clear the restriction in relation to all types of dwelling houses.

12.157 *RTPI*: We agree. This appears to be in line with previous other proposals flagging up the same change and will provide continuity.

12.158 *Rhondda Cynon Taf CBC*: The proposals provide clarity and bring the stop notice in line with other notices as far as issuing it.

Other comments

12.159 Comment on paragraph 12.116: the decline in the number of Stop Notices and the much lower number than the corresponding figures in England may be due to a fear of the having to make substantial compensation payments if an enforcement notice is quashed or withdrawn. The question of whether the current system is properly balanced is probably beyond the scope of technical reform but is a matter meriting attention in the future when an opportunity arises.

CONSULTATION QUESTION 12-17.

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

Number of responses

12.160 Total: 28 (27 in agreement, 1 in agreement subject to conditions.

Responses in agreement (without further comment)

12.161 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Cardiff Council; Huw Williams (Geldards); Liam Jones, NAPE

Responses in agreement (with additional comment)

12.162 *Allan Archer*: I agree as this improves clarity and simplifies the requirements.

12.163 *Carmarthenshire CC*: Agreed. Gives clarification on timescales.

12.164 *RTPI:* In principal we agree with the proposed amendments. Although question whether there is any requirement to change the procedure/wording when there appears to be very little wrong with the existing one. Unless it is for the changes to mirror the proposed changes to the breach of condition notice?

12.165 *Rhondda Cynon Taf CBC*: The proposals provide clarity and bring the stop notice in line with other notices as far as issuing it.

Responses in agreement (subject to conditions)

12.166 *PEBA*: Yes – subject to our response to 12-6 above. [Yes but with the caveat that it is important to avoid circumstances in which an occupier/landowner could become aware of a temporary stop notice before it has been displayed on the land. Any time gap could allow an occupier/landowner to carry out breaches of planning control, such as bringing residential caravans onto the land, without criminal sanction. It is agreed that the authority should have a power rather than a duty to serve copies of the TSN on the owner and occupier of the land and on others as may seem appropriate.]

12.167 *Michael Kiely:* An important tool to bring breaches of planning under control quickly. Currently there are two types:

1. Full stop notice – carries a risk of compensation if you get either the law or procedural issues wrong – risk is too high, so not used often

2. Temporary stop notice – carries a risk of compensation if you get the law wrong, but only lasts 28 days.

Only a need for one model – based on TSNs – and we must limit the risk of compensation. Proposed system: a stop notice initially lasting 28 days and it becomes permanent if an enforcement notice is served within that period. Compensation only if you get the law wrong.

CONSULTATION QUESTION 12-18.

We provisionally propose:

(1) that it be an offence to contravene a stop notice that has come into effect; and

(2) that it be a defence to a charge of such an offence to prove that the accused

- **had not been served with a copy of the stop notice, and**
- **did not know, and could not reasonably have been expected to know, of the existence of the notice.**

Do consultees agree?

Number of responses

12.168 Total: 31 (28 in agreement, 1 equivocal response and 2 in agreement subject to conditions).

Responses in agreement (without further comment)

12.169 Pembrokeshire Coast NPA; National Parks Wales; Allan Archer; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Cardiff Council; Huw Williams (Geldards); Liam Jones, NAPE

Responses in agreement (with additional comment)

12.170 *Carmarthenshire CC*: Agreed. Provides clarity re contravening stop notices.

12.171 *Rhondda Cynon Taf CBC*: The proposals provide clarity and bring the stop notice in line with other notices as far as issuing it.

Equivocal responses

12.172 *Richard White, Newport CC*: Agree with (1) but not (2)

Responses in agreement (subject to conditions)

12.173 *RTPI*: This appears to be acceptable but refer to comments made in 12–17 above.

12.174 *PEBA*: Yes – subject to our responses to 12-6 and 12-7 above.

CONSULTATION QUESTION 12-19.

We provisionally propose that:

(1) **a stop notice should cease to have effect when the planning authority makes a decision to that effect; and**

(2) **that such a decision should be publicised as soon as possible after it has been made, by the display of a suitable site notice and the notification of all those who were notified of the original notice.**

Do consultees agree?

Number of responses

12.175 Total: 28 (20 in agreement, 8 in agreement subject to conditions).

Responses in agreement (without further comment)

12.176 Allan Archer; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Monmouth TC; PINS; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Keith Bush; Huw Williams (Geldards); Rhondda Cynon Taf CBC; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.177 *RTPI*: This appears to be a common sense approach.

12.178 *PEBA*: Yes. A stop notice also can cease to have effect when the enforcement notice on which it is parasitic is not upheld on appeal or when the Secretary of State varies the enforcement notice on appeal to authorise the offending activity.

12.179 *Cardiff Council*: Agree (2) but a time frame issue may result with the Welsh translation etc. from the date the notice is withdrawn to the displaying the 'removal of the stop notice'

Responses in agreement (subject to conditions)

12.180 *Pembrokeshire CC; Ceredigion CC; POSW; Monmouthshire CC; Pembrokeshire Coast NPA & National Parks Wales*: Agree to part (1) however (2) needs to be clearer and state 'if the notice was originally publicised on site then such a decision should be publicised as soon as possible after it has been made, by the display of a suitable site notice and the notification of all those who were notified of the original notice'

12.181 *Newport City Council*: Yes but part (2) should be amended to reflect the publicity undertaken for the original notice.

12.182 *Lawyers in Local Government & Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services*: Yes. The provisions about publicizing a notice under s.183(7) relate to publicity by way of site notice and this will presumably be clear in the bill. It

is clear in the consultation paper but not from the question above – note concern of POSW in this regard.

CONSULTATION QUESTION 12-20.

We provisionally consider that where a stop notice is served by the Welsh Ministers under section 185, and subsequently quashed, any liability to compensation arising under section 186 should be payable by them and not by the planning authority. Do consultees agree?

Number of responses

12.183 Total: 29 (29 in agreement).

Responses in agreement (without further comment)

12.184 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; RTPI; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Rhondda Cynon Taf CBC; Liam Jones, NAPE

Responses strongly in agreement

12.185 *Huw Williams (Geldards)*: Completely agree.

12.186 *Allan Archer*: I agree as this seems only fair and logical.

12.187 *Blaenau Gwent CBC*: Wholeheartedly agree.

CONSULTATION QUESTION 12-21.

We provisionally propose that the offences under section 179(2) (breach of an enforcement notice) and section 179(5) (subsequent resumption of prohibited activity) to be framed so as to provide that a person commits an offence if:

(1) the person is in breach of an enforcement notice;

(2) the notice was at the time of the breach contained in the relevant register; and

(3) the person had been served with a copy of the notice; and

Do consultees agree?

Number of responses

12.188 Total: 28 (25 in agreement, 3 in disagreement).

Responses in agreement (without further comment)

12.189 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Newport CC; The Law Society; Neath Port Talbot CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

12.190 *Allan Archer*: I agree with this proposed change which a planning authority should be in a position to prove and which places the burden of proof I think correctly on the planning authority.

12.191 *RTPI:* This appears to be a logical approach.

12.192 *Liam Jones, NAPE:* Agree. But consider that thought should be given to the scale of fines in general. For example currently the regulations state that the maximum fine for not complying with an Enforcement Notice is £20,000 with the maximum for a Breach of Condition or Section 215 Notice being around £1,500. Given that some fines can be quite negligible in comparison to the amount of income derived from an activity or environmental damage taking place, the maximum fines should be amended. Removal of such maximum fines and replacing with an option of fitting the fine with the breach that has taken place – fine to fit the crime.

Responses disagreeing

12.193 *PINS*: No, PINS disagrees with this proposal. Under present provisions it is a defence for a person to show that he or she was not aware of the existence of a notice if that person has not been served with a copy of the notice and the notice is not in the register. This latter requirement ensures that those who become involved in the site after the notice has been served are bound by its requirements (and should consult the register). The suggested change appears to alter the existing 2 options to requiring that both steps (serving on the person and register entry) are necessary. It would seem undesirable that: 1) a person served with a notice could plead ignorance of it on the basis that the register is not up-to-date; and 2) a person who becomes involved in the site after the notice has been properly served can use the defence that he/she was not served with a copy.

12.194 *Torfaen CBC*: It may be equally as difficult for a LPA to prove that a notice was contained in the relevant register at the time of the breach because there is not a requirement to record the date when a notice is added to the register. Although, in reality, most LPA's are likely to add any new notices to the enforcement register within a couple of days of being issued/served, if the authority was asked to confirm exactly when a notice was added to the register then this may be difficult. Furthermore, it is questionable whether it is actually beneficial to include reference to the register in

respect of the above offences. No-one ever asks to see the enforcement register and there are probably very few people that know that one exists! Would it not be easier and fairer for the above offences to be proved with reference to points (1) and (3) only and to amend Section 179(7) accordingly? For those transgressors that weren't originally served with a copy of the enforcement notice (e.g because they have only recently bought the land to which the notice relates), there could be a requirement for the LPA to prove that they subsequently supplied the transgressor with a copy of the notice and therefore made them aware of its existence.

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

12.195 *Bridgend CBC*: No - (2) and (3) should not have to be satisfied. If the notice was properly registered at the time of the breach then whoever breaches it should be criminally liable. Otherwise, the LPA will have to show service on each individual person as well as the registration of the notice. All of the onus of establishing service will fall on the LPA. This reform will make prosecutions in Wales for breach of an enforcement notice much harder for the LPA and is likely to make evasion much easier. We should either stick with the current section 179 or at the very least say that the offence will be made out if the notice had been properly registered.

CONSULTATION QUESTION 12-22.

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

(1) **to enable an authority to give such an assurance simply by "giving notice" to the relevant person, rather than necessarily doing so by a letter; and**

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

Do consultees agree?

Number of responses

12.196 Total: 32 (28 in agreement, 3 in disagreement, and 1 other).

Responses in agreement (without further comment)

12.197 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC;

Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Rhondda Cynon Taf CBC; Liam Jones, NAPE

Responses in agreement (without further comment)

12.198 *Allan Archer:* I agree with this modernisation of this provision subject to the term 'giving notice' being carefully defined so that ways of giving notice which are not intended to be included (e.g. verbally via telephone) are clearly excluded.

12.199 *RTPI:* In principal, the proposed changes appear acceptable. Again, we are not aware of this particular section of the Act creating any issues. By simply being able to 'give notice' by way of an email rather than letter appears a logical approach. However, does giving notice extend to simply advising the person over the telephone and a note placing on the file?

12.200 *PINS:* Agree but suggest that it should state "giving written notice" to avoid confusion over unrecorded oral conversations.

Responses disagreeing

12.201 *Barry Town Council:* Do not agree with (3) written notice should be provided.

12.202 *Newport CC:* This could lead to connivance between parties to transfer/sell land to avoid the notice.

12.203 *Sirius Planning:* We disagree with the proposal to issue notice by other means than letter. Email addresses are regularly changed, or emails often lost into 'junk' folders; we consider that any communications should be supplemented by hard copy letter. Further, verbal notice should not be seen as sufficient.

Other comments

12.204 *Central Association of Agricultural Valuers:* We believe that where such an assurance it to be relied upon it must be given in writing, whether in a letter or by email, such that it can be held on record.

CONSULTATION QUESTION 12-23.

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

(1) **to the grant of planning permission generally, rather than just to permission for development already carried out; and**

(2) **planning permission following the issue of an enforcement notice, rather than following the service of a copy of the notice.**

Do consultees agree?

Number of responses

12.205 Total: 29 (28 in agreement, 1 equivocal responses).

Responses in agreement (without further comment)

12.206 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; RTPI; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Rhondda Cynon Taf CBC; Liam Jones, NAPE

Equivocal responses

12.207 *Allan Archer:* I query why the reference to 'development already carried out' is not correct since enforcement action would not be taken for development which has not yet been carried out. I agree that the circumstance indicated in 12.136 needs to be taken account of and that proposal (2) should achieve that.

CONSULTATION QUESTION 12-24.

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

Number of responses

12.208 Total: 28 (25 in agreement, 2 equivocal responses and 1 other).

Responses in agreement (without further comment)

12.209 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Newport CC; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Liam Jones, NAPE

Responses in agreement (with additional comment)

12.210 *Allan Archer:* I agree with this proposal on the grounds of consistency as indicated.

12.211 *Carmarthenshire CC:* Agreed. Would be subject to a fine through the courts.

12.212 *PINS*: This does not appear to be relevant to the work of PINS, however, this seems a reasonable suggestion.

12.213 *Rhondda Cynon Taf CBC*: Agreed. From experience the practice by the Courts in the past has been to impose a fine on summary conviction.

Equivocal responses

12.214 *The Law Society & Huw Williams (Geldards)*: We are unsure about this proposal. If the sentence both summarily and on indictment is an unlimited fine what is the purpose of proceeding by indictment? The availability of imprisonment, albeit only in the most serious cases provided a justification for retaining prosecution on an indictment. We suggest that the proposal is reviewed by reference to the current sentences for similar situations under environmental law.

12.215 *RTPI*: We note this provision only refers to supplying false information. For the benefit of s171 and s330 could this not also be extended to failing to comply with a Notice? Potentially a fine of any amount can only be a deterrent to those who may consider supplying false information. However we would be concerned magistrates courts would not give this offence serious recognition and without any guidance stipulate a low fine.

CONSULTATION QUESTION 12-25.

We provisionally propose that the offences of:

(1) **reinstating or restoring buildings or works following compliance with an enforcement notice (under section 181(5) of the TCPA 1990); and**

(2) **failing to comply with a breach of condition notice (under section 187A(9) of the TCPA 1990);**

should all be triable either summarily or on indictment, and punishable in either case by a fine of any amount, to bring them into line with the penalties for other breaches of planning enforcement notices under the TCPA 1990. Do consultees agree?

Number of responses

12.216 Total: 30 (28 in agreement, 2 equivocal responses).

Responses in agreement (without further comment)

12.217 Caerphilly CBC; POSW South East Wales; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Newport CC; Torfaen CBC; Neath Port Talbot CBC; RTPI; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Ceredigion CC; POSW; Monmouthshire CC; Pembrokeshire Coast NPA; National Parks Wales

Responses in agreement (with additional comment)

12.218 *Allan Archer*: I agree with this proposal on the grounds of consistency as indicated.

12.219 *Carmarthenshire CC*: Agree and welcome the proposal. Would be subject to a fine through the courts if don't comply OR undertake further works.

12.220 *PINS*: This does not appear to be relevant to the work of PINS, however, this seems a reasonable suggestion.

12.221 *The Law Society & Huw Williams (Geldards)*: We agree - but note comment in preceding response.

12.222 *Rhondda Cynon Taf CBC*: Agree that the penalties for non-compliance should be brought in line with other notices.

12.223 *Liam Jones, NAPE:* Agree – refer to 12-1 above.

Equivocal responses

12.224 *Country Land and Business Association*: Consistency is important. CLA is not in a position to know whether what is proposed is the right option.

12.225 *Central Association of Agricultural Valuers*: In principle we believe that fines should be proportionate to the damage and so that the level of any fine imposed should be justified.

CONSULTATION QUESTION 12-26.

We provisionally propose that sections 57(7), 302 of and Schedules 4 and 15 to the TCPA 1990, relating to pre-1948 breaches of planning control, should not be restated in the Code. Do consultees agree?

Number of responses

12.226 Total: 29 (29 in agreement).

Responses in agreement (without further comment)

12.227 Pembrokeshire Coast NPA; National Parks Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Carmarthenshire CC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; The Law Society; Neath Port Talbot CBC; RTPI; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Huw Williams (Geldards); Liam Jones, NAPE

Responses in agreement (with additional comment)

12.228 *Allan Archer:* I agree that on the basis as indicated that the provisions are redundant that there is no need to carry them forward.

12.229 *Rhondda Cynon Taf CBC*: Agreed that the provisions are redundant and should not be re-stated.

CHAPTER 12: GENERAL COMMENTS

12.230 *National Grid:* The ambition to make minor reforms is supported, and the proposals are measured and appropriate. Enforcement Notices are not a significant part of the company's business, but a number of our professional advisers have advised other clients and authorities about these matters. Improving the detail within Enforcement Notices to enable more effective compliance seems to fit well with this series of revision to Welsh Planning. [12-9, 12-10]. The formal grant of a planning permission in place of 'deemed' procedures make sense, and fits well with the revision proposed in Chapter 7. Aligning the procedural mechanisms for the issuing of enforcement notices and stop notices makes sense for the same reason. [12-16, 12-17]

12.231 *Michael Kiely:* Where you have a breach of planning control and it is unacceptable the solution is easy – issue a notice – but where it is capable of being made acceptable, but you need to apply conditions, that is difficult to do where the contravener refuses to make an application for planning permission. I suggest that is such circumstances the LPA should be able to issue a planning permission, but there should be a punitive fee in such circumstances (say 10x the normal planning application fee) which is put as a charge on the land. This enables LPAs to deal with these circumstances correctly, but also creates an incentive for someone to make an application where they are in breach of planning control.

Another issue is an application` being made as a delaying tactic for something that you want to enforce against. For retrospective applications there should only be one of three outcomes:

1. If PD, a S191 certificate is issued (full fee paid and retained)
2. If acceptable, planning permission is granted
3. If unacceptable, an enforcement notice issued

12.232 *Friends of the Earth Cymru:* We agree that there should be a single procedure for obtaining information as to the ownership of the land and its use. Transparent land registry for all land is a cornerstone of an open, democratic society.

12.233 *PEBA: R. v Wicks (Peter Edward)* [1998] A.C. 92 - We suggest that the Commission considers incorporating the principle established by this case into the statutory code – that it is a defence to prosecution for breach of an enforcement notice that there is a defect on the face of the notice rendering the notice a nullity.

12.234 *Huw Williams (Geldards):* Comment paragraph 12.116 - I think that the decline in the number of Stop Notices and the much lower number than the corresponding figures in England is due to a fear of the having to make substantial compensation payments if an enforcement notice is quashed or withdrawn. The question of whether the current system is properly balanced is probably beyond the scope of technical reform but I think it is a matter meriting attention in the future when an opportunity arises.

12.235 *Newport City Council:* Generally the enforcement system needs to be strengthened to give enforcement officers more powers to act decisively and quickly when development without planning permission takes place. At present they spend weeks trying to use the present legislation whilst the misuse of the land is continuing unstopped and rarely is the situation put back to its original condition.

12.236 *Caersws Community Council:* Fines for not following planning should be altered so there is a graduation of penalties or series of fines. Councillors feel that an applicant should never be able to benefit by not following the planning rules. Sometimes it is worth an applicant risking a fine for not following the required regulations as the gain is greater than the fine. There should be a system to ensure that this is never possible.

12.237 *Llandysilio Community Council and Llandrinio & Arddleen Community Council:* The most important element is that the proposals must include adequate 'teeth' to enable enforcement. We are currently faced with many applications in Powys where buildings have been constructed and then a retrospective application submitted. Perhaps a double fee should be imposed on retrospective applications to help persuade developers not to use this approach.

12.238 *Holywell Town Council:* A greater emphasis be placed on planning enforcement. That the retrospective planning application process is strengthened and more tightly controlled. That misuse of planning procedures carries more stringent penalties.

12.239 *Philip Jenkins:* I can agree with most proposals and the need for speedy approval or disapproval of planning applications. due to high number of abuses of the system I would like to make a retrospective planning application a criminal offence, when found to be blatant flouting of the planning laws. ie my authority has failed to act on a number of occasions just because of the cost involved. For example 100yrs+ oak trees cut down with orders on them,, the same developer then demolishing buildings without consent causing damage the paying neighbours for repairs, hence he has achieved his aim but not been punished, facing a custodial sentence would in my mind deter any developer from flouting the planning system come on get tough and protect the little man.

Chapter 13: Works affecting listed buildings and conservation areas

CONSULTATION QUESTION 13-1(1).

We provisionally propose that the control of works to historic assets could be simplified by:

(1) **amending the definition of "development", for which planning permission is required, to include "heritage development", that is:**

- **the demolition of a listed building; or**
- **the alteration or extension of a listed building in any manner that is likely to affect its character as a building of special architectural or historic interest; or**
- **the demolition of a building in a conservation area;**

(2) **removing the requirement for listed building consent and conservation area consent to be obtained for such works; and**

(3) **implementing the additional measures outlined in Consultation questions 13-2 to 13-8 to ensure that the existing level of protection for historic assets would be maintained.**

Do consultees agree?

Some consultees helpfully supplied statistics as to the number of applications for planning permission, listed building consent and conservation area consent in recent years. These are grouped together at the start of this section (and referred to by the use of "[S]" in the relevant response.

As with the other chapters, responses in agreement precede those equivocal or disagreeing. A number of consultees made responses raising similar points, relating to the following topics:

[P] Concerns that the proposal is premature

[E] Disagreement on the basis of loss of specialist expertise

[F] Disagreement on the basis of concerns relating to fees for applications

[C] Disagreement on the basis of concerns as to the role of Cadw

[W] Concerns as to call-in by the Welsh Ministers

[X] Concerns relating to the ecclesiastical exemption from listed building control

For simplicity these have been gathered together after the general responses, and referred to accordingly.

Statistics as to applications for listed building consent and conservation area consent

13.13 *South Wales Conservation Group:* Notes – Data is the average figures of applications over three years (2015/2016/2017) Jan to Dec

	1	2	3	4	5	6	6
Authority	Applications	LBC appns	CAC appns	Concurrent applications	Single appeals	Dual appeal	Any LDO's
RCT	1083	8.6	0	4.3	0	0	0
Monmouth	1135	95.3	9	51	1.3	0	0
Caerphilly	733	12	2	8	0	0	0
Cardiff	1,847	68	12	46	0	0	0
Bridgend	798	29.3	1	25	0	0	0
Blaenau Gwent	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Vale of Glam	1048	42	9	16	0	0	0
Newport	1359	34	2	14	1	0	1
Brecon Beacons NP	348	62.3	0	33	0	0	0
Swansea	1637	26	6.7	13.3	0	0	0

Column 1 is total number of applications received by the LPA that includes only PP and LBC/CAC. Not including DoC's/NMA's/Ag notices etc.

Column 2 is all LBC apps (excluding Doc)

Column 3 is total number of conservation area consent applications

Column 4 is concurrent LBC/CAC&PP applications

Column 5 is appealed LBCs

Column 6 is appeals for LBC and PP

Column 7 – any local development orders

13.14 *Mid and West Wales Conservation Officers Group:* The Average number of planning applications over three calendar years (2015 to 2017) per Local Authority in Mid and South-West Wales

	1	2	3	4	5	6	6
Authority	All appns	LBC appns	CAC appns	dual appns	single appeals	dual appeals	LDOs
Brecon Beacons NPA	348	62.3	0	33	0	0	0
Carmarthenshire CC	1340	156	12	61	4	2	0
Ceredigion CC	1042	50	4	22	1	0	0
Pembrokeshire CC	887	31.3	5	20	0	0	0
Pembrokeshire Coast NPA	1196	78	5	38	4	0	0
Powys CC	1378	83	4	28	0	0.33	0

Column 1 is total number of applications received by the LPA that includes only PP and LBC/CAC. Not including DoC's/NMA's/Ag notices etc.

Column 2 is all LBC apps (excluding Doc)

Column 3 is total number of conservation area consent applications

Column 4 is concurrent LBC/CAC&PP applications

Column 5 is appealed LBCs

Column 6 is appeals for LBC and PP

Column 7 – any local development orders

13.15 *Bridgend CBC:* Implementing the additional measures outlined in consultation questions 13-2 to 13-8 is not sufficient due to the lack of an evidence base to justify the change. Evidence has been provided already from South East Wales Local Authorities which clearly demonstrates that the issue of duplication, in reality, is not a problem experienced by local planning authorities in development management and this is borne out by the statistics provided by the joint South Wales Conservation Officer Group response. For example, over the previous 3 years in Bridgend, on average the following applications numbers have been dealt with which clearly indicates the minimal beneficial impact that the proposed changes will have on efficiencies/clarity. When balanced against the potential harmful effect outlined above, there is a strong argument to retain the current consent regime.

Applications – average per year	LBC applications	CAC applications	Concurrent applications	Single appeals	Dual appeal	Any LDO's
798	29.3	1	25	0	0	0

13.16 *Cardiff Council*: The table below details annual average totals for PP, LBC and CAC applications and appeals between 2015-17. Instances where an application for Listed Building Consent is considered with a concurrent application for Planning Permission or CAC average under 50 per year. This figure is possibly relatively high in Cardiff due to the number of Article 4 Directions in place. In most instances the applications are considered by a single case officer and this does not result in duplication of plan printing or significant other administrative burden. While a LBC application approval generally takes longer than that for PP, this is often due to their complexity or the Cadw notification period, which could be removed for Grade II buildings through an application for delegation if this authority thought that this was a significant issue.

As almost all applications are now made online through the planning portal, issues around duplication of plans noted within the consultation document are not considered to be significant. While two separate physical and digital case files are maintained, plans are only printed once. Efficiency savings would be very marginal. More significant time and cost savings would accrue from removing (digitising) the statutory newspaper notice requirements for LBC, LB setting, CAC and applications affecting the character or appearance of conservation areas. For Cardiff, the total projected expenditure on advertising in 2017-18 is over £60,000.

Applications	LBC applications	CAC applications	Concurrent PP/LBC /CAC applications	Single LBC/CAC appeals	Dual appeals
1,847	68	12	46	0	0

2015-17 average one year totals (excludes apps relating to conditions, amendments, certificates, adverts etc)

13.17 *Monmouthshire CC:* For example here in MCC we have roughly 1100 applications a year, of these roughly 100 are LBC applications and on average 50% of those are accompanied by planning applications. The proposed change will only affect 40-50 applications a year, roughly 5% of all applications processed by the LPA. In addition, in the last three years we have not processed a joint appeal, again showing that the frequency of the problem is in fact very very low.

13.18 *Chartered Institute for Archaeologists:* Monmouthshire County Council states that it receives about 1,000 planning applications a year and on average 100 listed building consent applications per year where approximately 50% of these have a concurrent planning application – this equates to only 50 applications out of 1000 being a perceived duplication. Pembrokeshire Coast NPA confirmed a similar number (53%)

of applications for listed building consent had an accompanying application for planning permission.

13.19 *Pembrokeshire Coast NPA & National Parks Wales:* Over the last two years, 24 (53%) listed building applications submitted to this Authority have also required planning permission. All were dealt with within the eight-week timetable (except those defaulting to the development management committee) and all of these applications were approved. The majority of both listed and planning applications were prepared by the Buildings Conservation Officer, with a Senior Planning Officer undertaking the more complex planning applications. In no part of the process was the existence of two consent regimes regarded as either complicated or unnecessary.

13.20 *Wales Heritage Group:* Evidence from Local Planning Authorities in Wales demonstrates that the actual number of duplicate applications for Planning Permission and Listed Building Consent is in fact a very small proportion of the overall number of applications received. For example, Monmouthshire County Council states that it receives about 1,000 planning applications per year and on average 100 LBC applications per year where approximately 50% of these have a concurrent planning application – this equates to only 50 applications out of 1000, being a perceived duplication. Pembrokeshire Coast NPA confirmed a similar number (53%) of applications for Listed Building Consent had an accompanying application for Planning Permission. As stated in the consultation, Vale of Glamorgan CBC, received 249 applications for listed building consent over the five years 2011–16, of which 112 (45%) were accompanied by applications for planning permission – this equates to just 22.4 applications per year. We do not consider this equates to the “many cases” asserted in the consultation document (para. 13.89).

13.21 *Peter Thomas:* I am aware of a sample of applications recently prepared by the South Wales Conservation Group (a representative body of conservation officers in South Wales) who found that of the three year average of 9988 applications received by ten authorities 377.5 (3.78%) of these were for listed building consent; and 41.7 (0.42%) were for conservation area consent. Under the proposal these applications would be considered ‘heritage development’ and would account for a total of 419.2 applications per year. This equates to 4.2% of all applications.

When one considered the number of applications over the three year period which are for both planning permission and listed building consent/conservation area consent the figures become even more stark. An average of 210.6 applications for both planning permission and listed building consent or conservation area consent were received in total per year by the ten authorities over the three year period. This is just 2.11% of all applications received over the period.

Unfortunately there is no further breakdown of the number of these applications that have been submitted by an application who has not used an agent, or cannot, reasonably, be expected to understand the difference between planning permission and listed building consent. One would assume that number is less than 211 out of 10000 but in a worse case scenario we are talking circa 2% of applications that may lead to ‘unnecessary complexity or inconvenience’.

Responses relating to listed building consent

Note: responses relating to listed building consent only, or primarily to listed building consent, are dealt with under this heading; responses or parts of responses relating to conservation area consent are dealt with under heading 13-1(2)

Number of responses

13.22 Total: 91 (31 in agreement, 54 in disagreement, and 6 others).

Responses strongly in agreement [3]

13.23 Llandysilio Community Council, Llandrinio & Arddleen Community Council

13.24 *Llandaff Conservation Area Advisory Group:* Llandaff Conservation Group strongly agrees with the Law Commission's proposal to define heritage development as "the carrying out of works for: (1) the demolition of a listed building; (2) the alteration or extension of a listed building in any manner that would affect its character as a building of special architectural or historic interest; and (3) the demolition of an unlisted building in a conservation area."

However, we suggest that the opportunity is taken to remove the anomaly in secondary legislation on permitted development that can allow partial demolition of buildings and boundary walls in conservation area by rephrasing (3) as "the demolition or alteration of an unlisted building or boundary wall in a conservation area." We explain our reasoning in greater detail below.

We also suggest that reference is made in the Code to the need for a heritage impact statement to accompany any planning application for heritage development.

Responses in agreement (without further comment) [12]

13.25 ICE Wales, Penstrowed Community Council, North and Mid Wales Association of Local Councils, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Newtown and Llanllwchaiarn Town Council, Lawyers in Local Government, Keith Bush; PEBA

Responses in agreement (with additional comment) [17]

13.26 *Historic Houses Association:* 1/ Cadw power of 'call in': Under the current system, Cadw grants LBC for Grades I and II* listed buildings (local authorities alone can grant LBC for Grade II buildings). Whilst we are in favour of the proposed merger of LBC into PP (meaning local authorities would administer LBC going forward) we feel it is important that Cadw retains the power to 'call in' cases where LBC applications in relation to Grades I and II* listed buildings are considered to be particularly contentious, or where the local authority in question lacks the in-house professional advice required to take a timely and robust decision. It will be essential that there is a robust (statutory) notification procedure, so that Cadw is alerted by the local planning authority when an application is deemed to have passed the threshold for 'call in'.

We would envisage this power of call in should only be used in exceptional cases. The majority of (former) LBC applications should be able to be dealt with by local authorities via the proposed single PP application. This principle is already accepted in the consultation paper (13.10 “we emphasise that we are not seeking in any way to dilute the level of protection afforded by the existing arrangements…”).

13.27 *PINS:* PINS agrees that the control of works to historic assets could be simplified by amending the definition of ‘development’ to include ‘heritage development’. However, should there be provision in 1(b) to include works which affect the setting of a listed building? It is agreed that removing the requirement for listed building consent and conservation area consent to be obtained would certainly simplify the process of obtaining permission, and avoid unnecessary duplication which is an inevitable consequence of two systems of control which overlap. It would also be clearer to those seeking to obtain consent if there were only one regime. PINS see no reason why these measures would not ensure that the existing level of protection for historic assets is retained, since it would represent a change to the regime only and not the principles of conservation.

13.28 *Historic Houses Association:* we agree in principle with the proposal to merge both conservation area consent and listed building consent into the planning system – subject to several important caveats.

Listed building consent

[W]

2/ Simplification for applicants as well as administrators: We are behind the principle of simplifying the system, but we strongly counsel that this must not be at the expense of a loss of flexibility for the owners and managers of listed buildings.

Paragraph 13.7 states that ‘any reform of the consent regime must achieve five aims: (1) it must maintain at least the current level of protection; (2) it must operate effectively alongside existing management systems; (3) it must make the system more accessible; (4) it must reduce bureaucracy, and make the system more efficient; and (5) it must simplify the legislative framework.’ Taken as a whole, paragraph 13.7 is drafted in favour of the legislators’ objectives, not the needs of the custodians of listed properties in Wales, most of whom carry a huge personal responsibility – pouring their time, money and energy into looking after Wales’s heritage assets. We strongly suggest a sixth aim is added to the list in paragraph 13.7, if it is intended that these aims are to be used in a future statutory instrument. Suggested wording could be ‘any simplification/amalgamation of the provisions must not increase regulation that would result in tighter control, and therefore less support for heritage protection.’ We acknowledge that paragraph 13.10 does state a desire ’to remove unnecessary complexity or inconvenience for those who use [the system]’, but ‘inconvenience’ is too weak.

3/ In addition, further clarification of the scope of this merger proposal is required. The consultation paper does not appear to propose merging LBC for interior work, presumably on the grounds that requires one application anyway?

4/ Finally, for the proposed system – which involves a significant transfer of responsibility for heritage matters from Cadw to local authorities – to operate effectively, it will be vitally important that local authorities employ sufficient professional conservation expertise.

13.29 *Nigel Hewitson:* I favour Option 5 [merging listed building consent and planning permission]. Provided that a combined s.16 / s.66 / s.72 duty applies to the consideration of all applications involving heritage development or other development involving any impact on the setting of a historic asset I consider there will be adequate legal safeguards and what one calls the consent needed to do works affecting the character of listed buildings and conservation areas is largely irrelevant.

13.30 *Douglas Hughes Architects Ltd:* We agree with the conclusion that works affecting a listed building are bewilderingly complex. A streamlined system combining listed building consent as well as planning consent is strongly supported. Removing any uncertainty from this process will go a long way to providing clarity to agents and clients, as well as officers. We are of the opinion that there are considerable commercial and developmental advantages to be gained from merging all consents into one. Notwithstanding different policy considerations, a consolidated application process would work more efficiently for us all.

13.31 *Llandaff Conservation Area Advisory Group:* Llandaff Conservation Group agrees that the current 3 types of authorisation (planning permission, listed building consent and conservation area consent) does lead to undue complexity. The Group sees the advantage, in terms of improved simplicity, of merging heritage consents with planning permission. However the Group considers it vital that this is not seen as down-grading the importance of heritage nor should it result in less detailed consideration of heritage aspects of planning applications. It is thus essential that such simplification is accompanied by the duty on Local Authorities to consider heritage matters as proposed in Section 5-4.

It will also be essential to amend the definition of development to include “heritage development” as set out in the consultation document in para 13.101. However in relation to bullet (3) of that paragraph and as stated above, we have specific concerns about the lack of clarity relating to partial demolition of unlisted buildings and boundary walls in conservation areas which we believe should be considered as “development”. Both buildings and their boundary walls contribute to heritage value and in many instances their removal leads to adverse impacts which neither “preserve nor enhance” the appearance of the conservation area.

The problem is illustrated by a recent case in Cardiff - Myrtle Villa, 14 High Street, Llandaff - which has highlighted the confusion and the very real threat posed to the integrity of conservation areas more generally from the pressure for parking space. Cardiff Council Planners have decided not to take enforcement action after being notified in November 2017 that substantial sections of the stone boundary wall (much over 1 metre in height) fronting a locally listed property in Llandaff Conservation Area had been demolished and the garden fronting the house excavated to it’s full width with the clear intention of creating a hardstanding.

We consider that the position needs to be clarified in primary as well as secondary legislation. Establishing the need for a planning application for partial demolition does

not imply that the proposed works will not be permitted, but does make it clear that the heritage impact of what is proposed needs to be assessed prior to any work commencing.

13.32 *Society of Antiquaries of London:* While we understand the concerns that the most substantial practical proposal of the document, concerning the merger of Planning Permission, Listed Building Consent and Conservation Area Consent into one consent, could be perceived as de-prioritizing and downgrading the legal protection of heritage assets under Planning Law, we are reassured by the repeated and unambiguous assurance and indeed emphasis that no diminution of protection is intended. We therefore cautiously support the proposal put at Question 13-1, and therefore the consequential proposals at Questions 13-1 to 13-8. We would, however, strongly advocate that the express commitment to maintaining effective heritage protection should be conditional on it being given substance by including an explicit requirement that in considering applications for development involving heritage assets (buildings and sites), planning authorities must seek and take account of specialist heritage conservation advice, and therefore must also have access to such advice on an established basis. This would then be consistent with the placement of Sites and Monuments Records (SMRs) on a statutory basis under the Historical Environment Act (Wales) (2016).

13.33 *Chartered Institute of Architectural Technologists:* Works involving listed buildings or those that are within a conservation area have always been difficult and challenging. We agree with the proposal to incorporate all three applications under one planning application process which will reduce the burden on planning authorities. This joined up approach may also provide the catalyst for Planners, Conservationists and even Building Control Officers to liaise more effectively.

13.34 *National Grid:* Unification of procedures for demolition of a listed building, alteration or extension of a listed building, and demolition of an unlisted building in a conservation area are not likely to be procedures used by the Company. We believe that the intended simplification of the administrative processes dealing with applications, decision making, and appeals fits well with the proposed revision to Welsh Planning. We have already expressed support for this broad principle.

13.35 *Mineral Products Association:* we support proposals to unify the consenting process associated with listed buildings and conservation areas with that of granting planning permission. We recognise the need for a sympathetic approach to be adopted to safeguard these specific issues but consider that a consensus could be achieved. There are those who are better placed than ourselves to add specific detail to the most beneficial route to delivering a unified consenting process.

13.36 *The Law Society:* There is clearly an opportunity to have greater simplification through the introduction of a unified consent which would encompass listed building consent, conservation area consent and planning permission.

There are already linkages between the planning system and the definition of sustainable development in the Well-being Act which acknowledges the promotion and protection culture, heritage and the Welsh language as components of the Well-being objective of “A Wales of vibrant culture and Welsh language”* as well as proposals for national significant infrastructure projects which have a unified consent

in the Development Consent Order (which merges planning permission, listed building consent and scheduled monument consent amongst others). We note that experience with nationally significant infrastructure projects under the Planning Act 2008 has not to date revealed any procedural problems or lessening in the protection of listed buildings.

We would however note caution with regards the details that would be required to follow through any unification though, to ensure that the relevant safeguards for the historic environment are maintained. For example, the ability to be able to clearly distinguish between the various regimes (planning permission only; listed building consent/conservation area consent only; and combined consent) is vital to ensure that there are no misunderstandings or unintended consequences arising. Also, the need for clarity regarding the basis for determination of such unified applications and the relationship between the development plan and the "special regard" elements of determination. There will also need to be clarity on the extent to which criminal offences will apply to the unified consent (so as the maintain the current situation when there is a breach of listed building consent/conservation area consent).

Some of these details and indeed concerns regarding unification may be dealt with/allayed through changes of nomenclature. The proposal refers to historic assets and heritage development, both of which would encompass scheduled monuments, yet the unified consent would not grant scheduled monument consent. With regards to this permission, there may be potential for future inclusion in a combined consent, as in the Planning Act 2008 regime – but perhaps a stronger pragmatic case for leaving the present system as is for the meantime. Making it clear what historic assets are covered by the proposed unified consent, and making it clear that heritage is not an afterthought would be welcomed. Suggestions may include "planning and heritage application/permission", or "heritage development application/permission" so that it is clear that these are different in nature to planning applications.

13.37 *Neath Port Talbot CBC:* Agreed. Whilst NPT are a member of POSW and they have opposed the merger of the consenting procedures, we do not share that view. Whilst option 5 is the most radical it is also the most sensible way of making the development process more efficient. It is not accepted that the merger of the two consenting procedures would dilute the protection of the historic environment if the legislation imposed strict/strong criteria upon planning authorities when determining planning applications involving listed buildings. i.e. there is no reason to dilute the issues requiring consideration just because the procedures have been merged. This should be viewed as a procedural change and not a dumbing down of the importance associated with protecting our historic environment.

13.38 *Glamorgan Gwent Archaeological Trust:* Works affecting listed buildings and conservations areas: We are generally in favour of merging the consents and subject to observation below our answer to consultation questions 13.1-3.8 is affirmative. We consider that the merging of the consents will strengthen protection of archaeological remains whether preserved in situ or by record.

13.39 *Andrew Ferguson:* It is considered that incorporating LB and CA consent within same application regime would provide significant benefits in practical terms to both members of the public and planning professionals. This will enable all of the elements

that comprise a scheme to be considered together and would reduce duplication of work and reduce uncertainty over the various types of consent that are required. The important status of heritage assets should be clarified in the code though.

13.40 *Pembrey and Burry Port Town Council:* The Committee agreed that merging the three consents into one made sense.

The Committee stated that it agreed with the recommendation as it would not adversely affect planning processes while ensuring appropriate protection of the historic environment was in place. [???]

13.41 *Bay of Colwyn Town Council:* The Council agrees with the recommendation to Merge All Three Consents Into One. The report on the Law Commission's Consultation Paper on Planning Law in Wales by a member of the General Purpose and Planning Committee included:

a) planning applications affecting Listed Buildings and Conservation Areas - there would be considerable advantages to be gained from merging all three consents into one

b) This is one I definitely would support given the time we take up with such joint applications.

13.42 *Huw Williams (Geldards)*: Agree with the proposal to simplify through unification of planning application, listed building consent application and conservation area consent procedures and to remove unnecessary supplication which is largely a result of the evolution of heritage asset protection as a parallel system.

The linkage between the planning system and the definition of sustainable development in the Well-being Act acknowledges the promotion and protection culture, heritage and the Welsh language as components of the Well-being goal of "A Wales of vibrant culture and Welsh language".

I think that as the discussion on the consultation paper notes objections to the unification are based upon the perception that the existence of a distinct but largely duplicate system is that it reinforces the special qualities of heritage assets and listed buildings. However, as the former Head of Legal at English Heritage notes, listing will not disappear and will continue to be main tool for the preservation of buildings of historic interest.

I suggest that a slight change of nomenclature might allay some objections. I propose that where a heritage development in is involved that the application and the resulting permission are known as a "planning and heritage application" and a "planning and heritage permission".

I particularly endorse the comments of Alan Firth quoted at paragraph 13-123 on the opportunities offered by a unification of consents for heritage and conservation officers to become more closely integrated with and pervasive within the planning system.

The incorporation of listed building consents into the Development Consent Order process under the Planning Act 2008 does not appear to have lessened the protection of historic buildings.

My only reservation concerns the need to ensure that the relevant safeguards for the historic environment are maintained. For example, the ability to be able to clearly distinguish between the various regimes (planning permission only; listed building consent/conservation area consent only; and the proposed combined consent) is vital to ensure that there are no misunderstandings or unintended consequences arising. Also, ensuring there is complete clarity regarding the basis for determination of such unified applications and the relationship between the development plan and the "special regard" elements of determination should serve to allay fears that a combined consent would weaken the protection of heritage assets. There will also need to be clarity on the extent to which criminal offences will apply to the unified consent (so as the maintain the current situation when there is a breach of listed building consent/conservation area consent).

13.43 *Rhondda Cynon Taf CBC*: Agree - subject to WG being clear in their requirements of LPA's and them funding appropriate staffing to properly facilitate the change or alternatively Cadw retaining a capacity for directing decisions.

Equivocal responses

13.44 *Country Land and Business Association:* Yes and no. The CLA sat on the Sounding Board of the Penfold Review (see 13.61), and has been involved in these questions. Other things being equal, the CLA supports better regulation and the simplification of planning and related processes. There are obvious benefits in simplifying consent regimes, but there are also disadvantages, and change should only be made where it gives rise to significant benefit and that benefit exceeds any disadvantages. This therefore needs to be considered on a case-by-case basis. We (in summary) do support merging conservation area consent (CAC) and planning permission, but we do not support merging listed building consent (LBC) with planning permission.

13.45 *Canal & River Trust:* The introduction of heritage development does not appear to create any meaningful benefits for the Trust. The multiple consent regime works for us but technically there doesn't seem to be any fundamental reason why the regimes couldn't be brought together. We also understand the benefits this may bring for Local Authorities in dealing with a single application for planning permission. It will however be critical for specialist conservation staff to be retained to provide appropriate advice.

[F]

Responses disagreeing (with additional comment) [48]

Bodies representing planning authorities

13.46 *Planning Officers' Society Wales:*

[E] [P]

This Chapter's proposals have been the most contentious, there is a consensus within POSW members that **the** two applications should be retained as existing. POSW noted that the timing of such inclusion of heritage is premature.

13.47 *South Wales Conservation Group:*

[E] [W]

The Group does not agree with the proposed replacement of the listed building consent regime with a single one for 'heritage development'. Neither does the group agree with the definition 'Heritage Development'. Heritage development is more difficult to define than 'Listed Building Consent. Heritage covers a wider remit – culture/language /tourism; therefore a change could cause confusion.

A more appropriate term might be 'Listed Building Permission', or 'Listed Building Development'. These terms would maintain the emphasis and retain the significance of the building in the minds of the owners. The group, whilst appreciating the position on this in England, have concerns that the combining of these 2 approvals will dilute the due diligence given to the applications. Keeping the 2 consents separate retains the focus on the 2 separate issues of demolition and development, otherwise there is unlikely to be special regard for the character and significance of the conservation area.

Implementing the additional measures outlined in consultation questions 13-2 to 13-8 is not considered to be an approach based on hard evidence for the need for change.

In terms of applications **and** consultation the majority of submissions apart from the most straightforward would be likely to be large and complicated with numerous supporting documents required. This is likely to present a more complicated package of information for specialist consultees, interested parties etc to consider, resulting in a higher risk of the heritage issues being downgraded/lost in the overall balance of the assessment of the application.

The use of a single application would result in a single decision. There are often scenarios where listed building consent is granted separately from planning permission, to the benefit of the development. Eg: where an LBC is awarded to a building at risk to enable remedial works, pending the planning approval. The para 13.107 suggests using heritage consent separately for this – but isn't that just reverting to the existing dual approvals system?

The group expresses **concern** at the perceived need for the change to the current dual application process. There is no awareness across the 10 authorities represented on the South Wales Conservation Group that the general public have any issues with the dual application process as it stands. A single set of drawings may be submitted electronically for Listed building consent and Planning applications, and there is no fee for Listed Building Consent.

Paragraph 13.10 refers to 'unnecessary complexity or inconvenience for those who have to use it', but this is not evidenced across the 10 authorities represented here in the day to day management of the **application** process. The numbers of

applications these changes would affect are in fact considered minimal. Evidence of volume of applications, received across the South Wales Group Authorities listed is attached at Appendix A. The evidence suggests that there is really very little actual duplication in comparison to the overall number of applications that are dealt with by each LPA. In addition with regard to the point in the consultation about duplication of appeals- the evidence so far shows there is no duplication going on in reality and so this really is a perceived problem not an actual one. A further argument against the combination of the two processes is based on the level of investment made to date by the Welsh Government in the consent regime, particularly in putting the raft of recent new guidance in place: TAN 24, and the full suite of Planning Guidance and Best Practice documents have just been completed after 7 years work. This is the first heritage Legislation specifically for Wales. Will it all have to be revised if these proposals are accepted? Removing the consent regime is likely to negate all of this previous and welcomed investment.

Wales for the first time has an Historic Environment Act. The work, consultation and commitment in development of this Act demonstrates the value that the political fraternity places on the built **heritage**.

The recommendations of this report have the potential to dramatically dilute the due regard that local authorities may have for Listed Buildings and Conservation Areas.

13.48 *Mid and West Wales Conservation Officers Group:*

[S]

The Mid and West Wales Conservation Officers Group has expressed concern at the underlying assumption that there is a need to change the current dual application process.

Paragraph 13.10 refers to 'unnecessary complexity or inconvenience for those who have to use it' but we do not recognise the concern and stated challenges by applicants in submitting dual applications for Planning permission and Listed Building Consent. By far the majority of applicants submit their applications on-line and complete only one application form and submit only one set of drawings. Agents questioned report that they are clear about the LBC consent process and are happy with the dual process.

Furthermore, the number of **dual** applications is relatively small in proportion to single listed building applications. Evidence of the volume of applications, received across the Authorities listed is attached at Appendix A.

The introduction of the Planning (Listed Buildings and Conservation Areas) Act 1990 was granted to enact special controls in respect of buildings and areas of special architectural or historic interest. At the time they were considered of sufficient value to warrant an act independent of the Town and Country Planning Act 1990 and the following quotation in 1989 by Charles Mynors added weight to the argument for the new act:

> It is not enough merely to **schedule** monuments, to list buildings and to designate areas. There must be a control mechanism to back this up with

special protective measures, with the force of the law. To some extent this can be achieved through the normal mechanisms of planning control. When planning permission is sought for a proposal involving the loss or alteration of a historic building, the local planning authority should be able to use its development control powers to ensure that unsuitable proposals are not allowed. However this has in the past proved inadequate. This is possibly because there have been insufficient planners with appropriate skills and knowledge. It is also because the legislation provides that planning permission is not required for demolition. [*Listed Building and Conservation Areas* by Charles Mynors 1989, 1st Ed. Longman Practitioner Series]

In terms of capacity, what has changed? Planning Officers tend not to be well-versed in heritage legislation and guidance (just as conservation officers tend not to be well-versed in planning legislation). A RTPI survey (The Planner 8th December 2017) undertaken in the summer of 2017 revealed that out of 4225 respondents, only 15% had been involved with heritage and conservation during the previous three years.

The current requirements of listed building legislation are comprehensive in terms of requiring any proposal to be considered against the conservation principles and heritage values, based on a proper understanding of the listed building itself. This is balanced against the justification of the proposal to see whether it is desirable or necessary. It is appropriate that proposals to change the character of a building of national architectural and historic importance should be properly and specifically considered under special legislation.

There is a serious concern that in combining the process of Listed Building Consent and Planning Permission, the ability to enact that special control will be watered down.

Wales, for the first time, now has a Historic Environment Act. The work, consultation and commitment in development of this Act demonstrates the value that the political community places on the built heritage. This Act, together with TAN 24, the revised Chapter 6 of PPWales and the suite of policy guidance documents, provides Wales with a comprehensive system of protection of the historic environment. After extensive consultation across the planning and heritage sectors, the draft legislation and guidance received a positive response and those 'on the ground' are now getting to grips with the new regime. We are not opposed to reassessment of the legal framework in which we work per se, however we believe that such sweeping legislative reform is premature and we would like to be given an opportunity to determine the effectiveness of the current legislation and guidance.

13.49 *Mid and West Wales Conservation Officers Group:* [C] [W]

The group do not feel that the definition 'Heritage Development' is a useful or appropriate term as heritage is generally a broad term which in the minds of many includes culture, tourism and language. It is stated that heritage development is 'to include any alterations to a listed building (including to its interior) that affect its character as a building of special architectural or historic interest', however, this term is far less clear to the public than Listed Building Consent. A more appropriate term could be Listed Building Permission or Development. This retains the significance in

the minds of owners of the non-renewable historic asset and ensures that the value is recognized.

A single application process is likely to present a more complicated package of information for specialist consultees, interested parties etc to consider, resulting in a higher risk of the heritage issues being downgraded/lost in the overall balance of the assessment of the application. Currently specialist consultees can easily assess the value and quality of an application from the relevant information available to them as part of the LBA: the information is specifically related to the issues surrounding the historic asset and its conservation. If combined with an application for planning permission, the submissions are likely to be large and complicated with numerous supporting documents required – a greater challenge for (the increasingly stretched) consultees to work through.

The members of the Mid and West Wales Conservation Officers Group felt that a dual application approach would be very unlikely to result in the existing level of protection for historic assets being maintained. Concern was expressed over the expertise that is in place across Wales to be able to deal with these applications as dual applications: many planning departments are shrinking the sizes of their specialist conservation teams. It is noted that there is currently no Listed Building Consent training in place for Planning Officers.

The use of a single application would result in a single decision. There are often scenarios where listed building consent is granted separately from planning permission, to the benefit of the development, eg: where an LBC is awarded to a building at risk to enable remedial works, pending the planning approval. The para 13.107 suggests using heritage consent separately for this – but isn't that just reverting to the existing dual approvals system?

13.50 *Association of Local Government: Archaeological Officers:* ALGAO is concerned by the proposed concept of 'heritage development'. Notwithstanding the objections detailed above, the terminology is also likely to lead to confusion rather than simplification if 'heritage development' relates entirely to designated historic assets and, more specifically, listed buildings and conservation areas. It is unclear for **example** how World Heritage Sites, the setting of Scheduled Monuments, Historic Parks and Gardens, historic landscapes and other designations might be considered in this context.

Much of the work of ALGAO members relates to planning applications which affect undesignated historic assets; those which are recorded on the regional Historic Environment Records (HERs), as well as those assets which are currently not recorded but are discovered through the course of development; generally buried archaeological remains or deposits, but also architectural details or historic stratigraphy within building fabric. It would therefore be likely that many 'developments' would continue to have significant heritage impacts and yet would not be defined as 'heritage development'. This would lead to objections and appeals from applicants and their agents as well as misunderstandings from some decision makers.

Chapter 13 highlights in several places the influence of 'LPA management commitment' (13.123) and 'the management attitudes and priorities within each

authority' (13.124) and as such acknowledges the reality that there is often variation in emphasis in the decision making from one authority to the next despite the planning framework and policy being the same. Implicit in this, is the understanding that some local authorities consider historic environment issues more of a priority than others. ALGAO believes that the proposed changes would give local authorities who do not afford high priority to protecting the heritage a useful justification for further reducing the weight afforded to heritage designations when balancing the relative merits of a planning decision. It would also allow such authorities to more easily justify further reductions in the numbers of specialist staff. It is naïve to suggest that pressure from relevant professional bodies along with Welsh Government guidance might effect change in this context (see 13.125).

The proposed reforms to the heritage consenting regimes as set out in chapter 13 are designed to achieve 'simplification', 'streamlining procedures' and 'making the system easier to use', rather than to strengthen protection for the historic environment. This paper sets the tone that heritage designations are, not only one of many considerations to be considered equally rather than given special regard, but should be considered subordinate to other planning considerations. The proposals imply that heritage designations are burdensome, onerous and that the current system is needlessly complex. This is not the experience of ALGAO members and we see no benefit to these changes.

Planning authorities

13.51 *Torfaen County Borough Council:* [F] The main benefits associated with requiring planning permission for "heritage development" are that it will no longer be necessary to deal with separate applications thereby avoiding duplication. There are also cost savings in terms of reduced advertising fees. However, there are concerns that the special status and protection of listed buildings could be undermined and diluted if they are subject to the need for planning permission rather than **separate** listed building consent. However, this is merely a perception as it is clear from the proposals that any applications relating to listed buildings would still be subject to the same principle being the need to "preserve".

13.52 *Monmouthshire CC:*

[S] [W] [E] [F]

MCC are opposed to the proposal to merge planning and listed building consents set out in Chapter 13 for the following reasons.

Current system. In the 1962 Act the 'list' as we know it was formalised and the concept of control was introduced requiring LPA's to have two months prior notification for intent to carry out works. In the 1971 Act in some instances Planning Permission operated as Listed Building Consent up until 1980. Therefore there has been a similar system to that proposed. Given the former 'one consent' process was abandoned, I question the evidence that returning to this system is an enhancement.

Evidence Paragraph 13.10 refers to 'unnecessary complexity or inconvenience for those who have to use it', but this is not evidenced here in the day to day management of the application process. That there are duplicate applications, forms, reports,

decisions, appeals, enforcement notices etc. In reality this is simply not the case, as most information is electronic the difficulty or in convenience that this causes is small, appeals are dealt with at the same time whilst still retaining the separate emphasis. The numbers of applications these changes would affect are in fact minimal. Paragraph 13.87 identifies the negatives of maintaining the current system solely in relation to duplication, which as evidenced above happens in a relatively small number of circumstances. It is considered that the harm of the change far outweighs any perceived benefits.

The perceived benefit of streamlining such a small number of applications a year is not considered to outweigh the potential detriment to a finite resource on such a small number of total applications considered by LPA's.

In addition a recent customer survey asked our customers what mattered to them. The answers were time, access to an officer who can provide clear advice and consistency in decisions. There were no concerns from owners or agents relating to applying to two conditions.

Current Guidance. A further argument against the combination of the two processes is based on the level of investment made to date by the government in the current consent regime, particularly in putting the raft of recent new guidance in place: PPW Chap6, TAN 24, and the full suite of Guidance documents have just been completed after 7 years work. This is the first heritage Legislation specifically for Wales, and places a clear emphasis for the first time on the importance of the historic environment. Whilst the guidance documents may be retained if the consents were to merge, the loss of a separate consent regime will send a contradictory message. This new full suite of guidance has not been given time to bed in. There have been some considerable improvements in guidance, especially in areas that simply have not been covered before. Whilst we appreciate that this does not change the impact or use of the guidance, as we have just had a suite of documents that are supposed to help, integrate and make decisions more transparent- it would be best to give this time before making such a radical change. The consolidation of pp and lbc would fundamentally undermine the progress made in the last 12 months.

Dilution of Importance of the Heritage Asset. Whilst it is noted in para 13.7 and 13.10 that the proposed change in process should not dilute the level of protection afforded by the current regime, we still have significant concerns over the potential for this to happen together with the loss in emphasis on the finite historic resource given the loss of a separate consenting regime. It is understood that the wording in the legislation will maintain its emphasis on protection and due regard, however in practice this will no longer be the primary focus for an application as it will be balanced against the other planning issues rather than being a standalone consideration.

The recommendations of this report have the potential to dramatically dilute the special consideration that local authorities may have for Listed Buildings and Conservation Areas. Applications for heritage development would see changes to a listed building balanced against all other factors which in many cases could see irreparable damage and loss of a finite resource based on the need for new housing or creation of jobs. The historic environment makes up such a small number of buildings across the whole building stock of Wales, it is only right that buildings of

national importance should have a separate process to manage their change, retaining what is special for generations to come.

Opportunities for Change

Advertising: In addition, a large element of the cost of processing applications is the need to advertise in the local paper for each LBC application and each application to discharge or vary a condition attached to a LBC. This is extremely costly to Local Planning Authorities who, in all but a very small number of cases provide all the necessary information online. Access to a view online information is also generally provided in public spaces within council offices. Therefore given the far wider public access to applications, it is suggested that expensive advertising should be re-considered as part of this review.

Pre-application: The current system of pre-application advice for listed building and heritage related issues is at the discretion of the Local Planning Authority, it is suggested that this should be a statutory service. This would be a fee paying service and LPA's should be able to set their own 'bespoke' service much like the current system for planning applications.

Non Material Amendments: At present there is no scope within the legislation to make minor changes to the approved plans as part of the listed building consent application. Often during construction, plans change and quite possibly forced by the discovery of unknown but important historic fabric. It is suggested that a quick process of minor amendments should be formalised so that this is available to the customer and that change can be managed in a time effective way.

13.53 *Bridgend CBC:*

[S]

No - If all LPAs had the delegated powers to determine LBC apps without having to refer them to Cadw then there might be scope to combine PP with LBC/CAC but there is a very real risk that the special heritage considerations would be downgraded by combining them into one application. More specifically:

- 'Heritage Development' – the reduced status and level of significance of buildings of "special" interest would also have the indirect impact of lessening the significance and value of non-designated sites/assets of local importance as they will not be encompassed by, or associated with, this definition. Heritage development is more difficult to define than 'Listed Building Consent'. Heritage covers a wider remit – culture/language/tourism; therefore a change could cause confusion.

- Removing the requirement for separate listed building consent and conservation area consent will have a significant impact on the level of consideration given to demolition and alterations to listed buildings and historic assets in conservation areas. Retaining the requirement for separate consents keeps the focus on the separate issues of demolition and development. Otherwise it is unlikely that special regard will be given to the character and significance of the conservation area, particularly

where there are other competing economic/social material considerations.

- In terms of applications and consultation, the majority of submissions, apart from the most straightforward, are likely to be large and complicated with numerous supporting documents required. This is likely to present a more complicated package of information for specialist consultees, interested parties etc. to consider, resulting in a higher risk of the heritage issues being downgraded/lost in the overall balance of the assessment of the application.

- The proposed changes to the consent regime are unlikely to result in the existing level of protection for historic assets being maintained. The current systems clearly allows for recording of change and assessing the cumulative effect of change on historic buildings (whether works require listed building consent/conservation area consent or not). Applicants are currently encouraged to include a comprehensive approach to applications for listed building consent to record all changes/repairs however minimal as each listed building is unique. If this is brought into the mainstream planning consent as 'heritage development', the risk is that this approach will be diluted to include only works stated in the GDPO. There is also some concern with regard to the level of expertise across Wales and whether it is sufficient to be able to deal with dual applications within planning departments and their potential impact on conservation staff.

- It is not clear how these proposals will impact on Cadw's role in the process and its intention to roll out delegation of listed building consent where appropriate.

- The potential implications of a combined consent regime is likely to be that all 'Heritage Development' applications would need to be referred to Cadw with the ensuing resource implications for them, and inevitable delays for the applicants.

- The timing of this proposal is unjustified, particularly in light of the Historic Environment Act and ensuing revisions to national guidance and best practice guidance.

13.54 *Bridgend County Borough Council*: There appears to be a perceived need for the change from the current dual application process, despite a general lack of evidence to support this future direction. Electronic submissions and issuing of decision notices/reports for Listed Building consent and Planning **applications** means that any duplication is minimal and this has to be weighed against the risks outlined in these comments in relation to the dilution of control and reduced protection afforded to heritage assets.

Paragraph 13.10 refers to 'unnecessary complexity or inconvenience for those who have to use it', but this is not evidenced across the authorities in the day to day management of the application process.

The number of applications these changes would affect are in fact relatively negligible and the removal of the existing consent regime is likely to negate the time and effort invested in the past 7 years in the preparation of the Historic Environment Act and its associated guidance. The work, consultation and commitment in the development of the Act demonstrated the importance that the political fraternity places on the built heritage.

The recommendations of this report have the potential to dramatically dilute the due regard that local authorities may have for Listed Buildings and Conservation Areas.

13.55 *Merthyr Tudfil CBC*: Disagree. The existing system of 2 separate applications should be retained. It does not cause an issue currently and could have the unintended consequence of devaluing the LB element.

13.56 *Cardiff Council*:

[S] [F] [C]

No, we do not support the proposed merging of consents for the reasons set out below:

Simplification – LBC: The established listed building consent process provides clear distinction of the unique status afforded to proposals affecting the special interest of these nationally important buildings and structures. To replace or combine this process with one for proposals affecting 'heritage development' would arguably weaken this distinction. It would also in our view not result in simplification, as it would exclude from the definition those proposals affecting other heritage assets such as scheduled monuments; locally listed buildings; alterations within conservation areas (due to Article 4s or otherwise); archeologically sensitive areas; registered historic parks and gardens; undesignated assets of local significance or issues of setting. This would likely lead to greater confusion than exists presently, which is in our experience very minimal given that the Act has been in force for nearly 30 years.

Fees: The change would likely introduce new fee ambiguities, where elements requiring planning permission under existing regime would need to be separated from those only currently requiring LBC.

We are aware that proposals to remove LBC fee exemptions have been long-debated and generally opposed by heritage organisations, primarily on the grounds that to introduce a fee could lead to an increased burden on, and possibly resentment from, owners, with an associated increase in unauthorised works also envisaged. This view is shared by this authority, particularly given the pressures on enforcement officer resources that are faced by all local authorities. Even if the powers and criminal proceedings remain, for a variety of reasons the reality is that prosecutions are rare.

13.57 *Pembrokeshire Coast NPA & National Parks Wales:*

We do not agree with the proposed replacement of the listed building consent regime with a single one for 'heritage development' for the following reasons:-

[P] [E] [C] [S] [W]

2. The perceived need for change.

The need for change is based, we feel, on a mixture of misconception and overstatement. We are not aware for example of public concern that submitting dual applications is a problem. There is no fee for listed building applications/pre-applications, and a single form and set of drawings may be submitted electronically for both planning and listed building consent. The perceived complexity or inconvenience to users as cited in paragraph 13.10 is actually minimal. The concerns expressed to us by applicants relate not to the separate regime of listed building consent, but the need to address other statutory matters such as protected species and archaeology, as well as policy issues such as affordable housing contribution and accessibility/sustainability.

There is a certain flavour in some of the consultee responses cited that heritage may be construed as a negative factor, something quite 'exclusive' from other aspects of the planning process (this of course may be applied to other disciplines within the planning process). The listed building consent process – like planning – allows the right of appeal for applicants. Any problems 'on the ground' – anecdotal or otherwise – are surely addressed by better deployment of resources across the sector, better training etc – rather than effectively dispensing with the listed building consent regime. The sector is live to change in this respect, but officers are thin on the ground, some planning authorities lacking a building conservation officer altogether – other large rural counties such as Powys and Carmarthenshire having only one. The experience of the Task and Finish Group set up by the then Minster to investigate the sharing of services across Wales shows that a stronger lead from Cadw is needed.

4. Application process and protocol

In terms of the application and subsequent consultation process, a single consent regime is likely to lead to complicated and large submissions for all but the most straightforward schemes. Such will require the combination of background documents required to address planning policy matters, statutory issues such as ecology and archaeology, as well as statutory requirements relating to heritage matters, namely a Heritage Impact Statement. Presently, the dual system is clear on what is required to accompany each application (with a certain amount of documentation – drawings, ecology report, application forms) being common to both. This allows for a clearer assessment by both planning and heritage officers, and a less complicated consultation process whereby specialist consultees and interested parties will have less documentation to wade through with less risk of heritage issues being diminished.

The proposed single regime implies a single decision. There are, however, a number of occasions whereby listed building consent may be granted separately from planning permission to the benefit of the overall scheme. One example would be a building at risk whereby the granting of listed building consent could facilitate remedial works without awaiting the planning decision on a contentious change of use or redevelopment – or without awaiting the results of a bat survey. Paragraph 13.107 suggests that this issue may be overcome by seeking heritage consent separately for each element. In effect, this would be no more efficient to the applicant than the existing dual system (notwithstanding the resources involved in changing the

legislation). It also pre-supposes that conservation officers will remain in place to pick up 'specialist' applications as and when. A single over-worked or inexperienced officer dealing with a 'heritage development' is likely to result in delays for the applicant, or even costs in pursuit of unnecessary information or the imposition of unnecessary conditions.

We are unclear as to how 'heritage development' may be reconciled with the statutory duty to pay special regard to the desirability of preserving the setting of a listed building (s. 66 1990 Act)

In terms of the demolition of a listed building – a relatively rare event – we disagree that a single regime would be beneficial. The current requirements of listed building legislation are comprehensive in terms of requiring any proposal to be considered against the conservation principles and heritage values, based on a proper understanding of the listed building itself. This is balanced against the justification of the proposal to see whether it is desirable or necessary. It is only right and proper that the loss of a building of national architectural and historic importance should be properly and specifically considered under special legislation.

5. How are the issues different in Wales?

We are concerned that the proposed changes put the heritage of Wales at risk, creating a regime at odds with England, Scotland and Northern Ireland, where dual control is in place. Welsh legislation to this effect would certainly give the impression that heritage has a lesser role to play within this country. We see the single consent regime as a return to the days prior to the 1990 Listed Buildings and Conservation Areas Act - a major watershed for heritage protection, whereby listed buildings and conservation areas were for the first time ever the subject of a separate Act. During the next decade, most planning authorities within Wales set up posts for building conservation. The issues facing the built heritage in Wales are no different to those elsewhere, except perhaps that Wales is economically poorer and heritage resources unevenly spread.

The 2013 amendments to the GDO have raised some complications in Wales whereas small works such as satellite dishes and the alteration of chimneys now require planning permission as well as listed building consent in most cases. Common sense would suggest that these are issues best dealt with through listed building consent, given the special status of such buildings. Merging the consents will cause further public confusion on what can and can't be done under permitted development rights.

13.58 *Gwynedd Council:*

[C]

As already expressed in POSW's response, it is unclear as to the reason behind the proposal to unify planning permission and listed building consents, when as a Conservation Officer who deals with both planning and listed building applications directly, there is no great concern with the current system or therefore the reason for this change. Since the adoption of the new Historic Environment (Wales) Act 2016, the new TAN 24 and Cadw's suite of guidance documents, Wales has a strong

system of policy protection for the historic environment which makes dealing with applications much simpler with the legislative background and support. To change this so soon after the adoption of said policies would seem rather counter-productive and premature. There is a strong concern that the unification of both applications may dilute the significance of the historic environment somewhat, where the historic and architectural significance of listed buildings may become diluted and overlooked within the overall planning process. It is therefore encouraged to retain the existing process of two separate applications.

13.59 *Caerphilly CBC and POSW South East Wales:* No, the current system works well without major complaint, and ensures that the heritage issues are not subsumed by all of the other matters that are relevant to the determination of a planning application. The proposed extension to the definition of development appears more complicated than the existing definitions, i.e. there is a **definition** of development that applies to all buildings, but the need for listed building consent only applies to those works which affect the architectural and historic character etc. of a listed building. The latter is clearly a subset of the former rather than it all being lumped into one definition.

[C]

13.60 *Blaenau Gwent CBC:* The notion of one application fits all is appealing in many ways. However, this suggestion could give rise to many practical difficulties and lead to new problems rather than deal with a problem that may not even exist. For example, those LPA's without delegated powers from Cadw would have to refer applications to Cadw where the heritage issues might cloud the wider planning considerations thus delaying some developments. It might also be perceived as watering down the special controls that exist for our heritage assets. This suggestion should be dropped or at the very least the subject of further consideration before proceeding.

13.61 *Carmarthenshire CC:* We do not agree with the proposed replacement of the listed building consent regime with a single one for '**heritage** development' for a number of reasons, including the following:-

1. It is stated that heritage development is 'to include any alterations to a listed building (including to its interior) that affect its character as a building of special architectural or historic interest', however, this term is far less clear to the public than Listed Building Consent. The term Heritage in one of its common definitions is:

Valued objects and qualities such as cultural traditions, unspoiled countryside, and historic buildings that have been passed down from previous generations.

It is commonly taken to include language, culture and tourism and therefore, in the eyes of the listed building owner seeking to undertake work on their listed building, is misleading. A more appropriate term could be Listed Building Permission or Development. This retains the significance in the minds of owners of the non-renewable historic asset and ensures that the value is recognized.

2. The introduction of the Planning (Listed Buildings and Conservation Areas) Act 1990 was granted to enact special controls in respect of buildings and areas of special architectural or historic interest. At the time they were considered of sufficient value to warrant an act independent of the Town and Country Planning Act 1990.

There is a concern that in combining the process of Listed Building Consent and Planning Permission, that the ability to enact that special control will be watered down.

Wales, for the first time, now has a Historic Environment Act. The work, consultation and commitment in development of this Act demonstrates the value placed on the built heritage. This Act, together with TAN 24, the revised Chapter 6 of PPWales and the suite of policy guidance documents, provides Wales with a comprehensive system of protection of the historic environment. We are not opposed to reassessment of the legal framework in which we work per se, however such a legal revision is premature and we would like to be given an opportunity to determine the effectiveness of the current legislation and guidance.

3. Generally applicants in the County do not appear to be challenging the need for submitting dual applications for Planning permission and Listed Building Consent. The majority of applicants submit their applications on-line and complete only one application form and submit only one set of drawings. Agents approached re this change report that they are clear about the LBC consent process and are happy with the dual process.

4. In Carmarthenshire we recognise the value that the built heritage plays in the local economy and in engendering a sense of place in the county. Paragraph 13.7 states that merging separate consent regimes should result in efficiency savings. We are unclear as to what these would be other than the potential that planning authorities use the merger of the two systems to justify the loss of specialist staff re building conservation. However paragraph 13.125 suggests that this loss of skill should be resisted either via guidance from the Welsh Government or through pressure from professional bodies. This we feel is an unrealistic suggestion considering that the Welsh Government has no jurisdiction over Local Authority staffing and professional bodies such as IHBC and Civic Societies are insufficiently resourced to lobby effectively in this respect.

5. A single consent regime is likely to lead to greater complication rather than the suggested simplification for all but the most straightforward schemes. The range of consultees required for each application will be enormous and the concern is that the 'Heritage Development' element of a planning application will be lost. Currently, the dual system is clear on what is required to accompany each application with a certain amount of documentation – drawings, ecology report, application forms being common to both. This allows for a clearer assessment by both planning and heritage officers with less risk of heritage issues being diminished.

The current requirements of listed building legislation are comprehensive in terms of requiring any proposal to be considered against the conservation principles and heritage values, based on a proper understanding of the listed building itself. This is balanced against the justification of the proposal to see whether it is desirable or necessary.

13.62 *Ceredigion CC:*

A 2017 survey (The Planner 8th December 2017) undertaken in the summer of 2017 only 15% of RTPI members had been involved with heritage and conservation during

the previous three years. In terms of practicalities, it is difficult to envisage a single officer – whether a planner or heritage **professional** – successfully determining an application for 'heritage development' in all but the simplest of cases. This of course is in the face of the required eight-week turnaround, and economic/political pressures.

Whilst the merging of Planning Permission and Conservation Area consent could probably be merged without too much confusion, to deal with Listed Buildings in the same manner would have the effect of reducing the importance of the Listed Building designation.

There are numerous instances where Listed Building Consent is required but Planning permission is not. The consequences of merging the applications have not been fully considered in such situations. Merging the applications will only lead to further confusion.

The current system works well, and is not confusing. Listed Building Consent and Planning Permission can be issued independently of each other if needed giving more flexibility than a merged system. A merged system could be viewed as a way of introducing charging for Listed Building consent.

Also, as a single application built conservation officers would have to deal with all aspects including ecology, flooding, highways etc during determination of an application.

With the introduction of new legislation under the 2016 Historic Environment (Wales) Act, TAN 24, the recent revision of Chapter 6 of PPW Wales and the suite of policy documents, (Some of which did not come into use until September 2017) Wales has a comprehensive system of protection of the historic environment. It would have been logical to allow some time to assess how well these new regulations are working before introducing more legislation. What is now proposed removes in one sweep a system of consent dedicated to protecting the built heritage of Wales, a system much refined and revised within the last two years.

CCC considers that such a proposal is premature and review of the legislation should at the very least be delayed until the effectiveness of the new legislation and guidance becomes apparent. Ceredigion County Council data on all planning, LBC,CAC, concurrent applications and appeals / dual appeals are set out within the footnote below [Appendix A].

The changes noted within this chapter seek to achieve five main aims:

- it must maintain at least the current level of protection;
- it must operate effectively alongside existing management systems;
- it must make the system more accessible;
- it must reduce bureaucracy, and make the system more efficient;
- it must simplify the legislative framework.

It is important that any proposals introduced do not dilute the level of protection afforded by existing legislation. CCC considers numerous aspects of the proposals in Chapter 13 to be contentious and premature.

With the 2016 Historic Environment (Wales) Act, TAN 24, the revised Chapter 6 of PPW and the suite of policy documents, Wales has a comprehensive system of protection of the historic environment. Those 'on the ground' are now getting to grips with the new regime, despite decreasing resources. The Council considers that such a proposal is premature and review of the legislation should at the very least be delayed until the effectiveness of the new legislation and guidance becomes apparent.

13.63 *Pembrokeshire CC:*

[C]

13-1 (1) (a) and (b). PCC do not agree with the proposed amendment of the definition of "development", for which planning permission is required, to include "heritage development" for the demolition of a listed building, or the alteration or extension of a listed building in any manner that is likely to affect its character as a building of special architectural or historic interest.

The existing system of listed building consent is clearly recognisable, clearly separate from planning permission, and is indicative of the status of a listed building as needing this specific consent, avoiding any potential conflict with development plan policies, the weighing exercise that applies to planning permission and the possibility of criminal proceedings for carrying out works to a listed building without authorisation. The current system is generally well understood by both agents, architects and applicants. This understanding has been assisted by a raft of guidance documents from Cadw in recent years, as well as simplification of the advice in respect of treatment of listed buildings provide in TAN 24. PCC consider that this proposal for revision is likely to substantially increase confusion as well as generally weakening existing protection for our Built Heritage. Introducing these changes at this point, following the introduction of the first Historic Environment (Wales) Act 2016 also appears short-sighted, given the work, and evidence which was considered during the development of that Act.

We do not agree with the proposed title 'heritage development', as it would not be an all-inclusive term, as no proposals to alter the regimen of Scheduled Monument Consent appear to be included. We don't feel that introducing a much less well defined term into this specialist area is helpful. You have a listed building, and therefore you require Listed Building Consent; this appears to make perfect sense, and reinforces the significance of a listed building as something to be afforded the special protection the Planning (Listed Buildings and Conservation Areas) Act gives to it. The separate need to have planning permission for similar works to a listed building can be confusing on occasion, but those well versed in the system know they are to consider very different elements and that one could potentially be given without the other being forthcoming, as listed buildings are given special consideration as a non-renewable asset. This consideration is given by technical experts within Local Authorities, and is a separate stage from planning permission for a reason, not least because of the criminal offence element of the legislation. Listed Buildings account

for a small percentage of the housing stock in any given area, and applications that require both LBC and planning permission amount to roughly 50% of the small percentage of applications for LBC with PA submitted to a Local Authority in any given year. The system of LBC introduced in the 1990 Act replaced a system similar to that proposed by this question, and following 1990 has not failed or become unworkable. There does not appear to be any justification for changing this approach currently.

Over and above every other consideration we are worried that the special consideration given to a listed building under the Planning (Listed Buildings and Conservation Areas) Act 1990 would be lost, and that loss of focus would undo the increase in profile and protection the historic environment and its proven benefits for tourism, the economy, sense of place, education etc. as well as recognition of its intrinsic historic and cultural value since the inception of the 1990 Act.

Currently in circumstances where both a planning and listed building application have been received and where the planning application seeks permission for development in the grounds of a listed building or on adjoining land, there is potential for LBC to be granted in advance of planning permission thereby allowing necessary works to a listed building to be carried out to avoid deterioration. If the planning issues became protracted then the LBC part of a joint application could be delayed to the potential detriment of a listed building. Similarly if LBC issues became protracted due to the specialist nature of details required then there could be an increase in appeals against non-determination. Currently if there are issues holding up the grant of LBC these do not prevent the issue of planning permission which can be an important document in raising finance for a development project.

13-1 (2): We do not agree with the proposals for the removal of the requirement for Listed Building Consent for the reasons considered above, and do not consider that this approach is the correct one for the removal of the requirement for Conservation Area Consent either.

13-1 (3): We do not agree with the implementation of the additional measures outlined in consultation questions 13-2 – 13-08 as we fundamentally disagree with the proposed principles outlined in Question 13-1 (1) and (2). Leaving the existing system in place would ensure that the existing level of protection for historic assets would be maintained, and would not introduce unnecessary confusion into a system that currently works well and is understood by the vast majority of people who use it.

13.64 *Newport City Council:* No. The proposed simplification is not considered to be appropriate. It is clear that they are very separate processes. It is considered that the proposed approach would make the impact on the historic asset merely one part of the assessment and that when weighing up the proposal as a whole, the impact on the historic asset could be outweighed by matters such as economic investment, regeneration or the delivery of affordable homes.

The joining up of the process suggests that planning consents and LBC are somehow the same thing. Application validation requirements are different in respect of Heritage Impact Assessments and DAS's.

There is also the issue of delegated powers for approval by Local Planning Authorities, some authorities have the delegated power to decide LBCs for internal

works on Grade II Listed Buildings. Otherwise Cadw is required to be given 28 days to consider the recommended decision from the LPA.

In addition fees and the proposed exemptions would have the potential to cause a lot of confusion. The planning process also allows partial permissions which is not possible with a LBC how would this be overcome?

Parish Councils

13.65 *Barry Town Council:* Disagree. All of questions covered in Chapter 13 raised concerns for this Council. It would appear that the Chapter is attempting to downgrade heritage sites in Wales.

Professional institutes

13.66 *RTPI:*

[F] [E]

The crux of the issues in relation to this chapter relates to the unification of consents and removing the requirement for listed building consent and conservation area consent. Many of the other key elements and questions flow from this central question. We have therefore not directly addressed the consultation questions set, but instead consider below the unifying of these consents and the options set out in the consultation paper.

RTPI Cymru has previously expressed concerns that the importance given to historic assets may become diluted under a unified consenting regime, along with the risks of losing specialist skills. There does appear to be a mixed response on this issue from the scoping opinion feedback set out in the consultation document. While the Law Commission seeks to address these concerns there remain mixed views amongst our membership on whether the outlined proposals override the concerns we have previously raised.

We recognise that a potential benefit of unifying consents may succeed in getting Conservation Officers and Planning Officers to routinely work together in considering all aspects of all applications and thus heritage issues may become more engrained in the wider planning psyche. It could result in a simpler process for submission and processing for all stakeholders. We also note from the consultation document that the "the majority of respondents to the scoping paper supported the proposals to unify consent regimes", although much of the support was heavily qualified.

However, many of these potential positives are based around planning culture and the way we work and do not appear to consider the potential impact on listed buildings themselves, their important status and the special and distinct consideration of settings, features etc While the Law Commission asserts that they are not seeking to dilute the level of protection for historic assets, we have concerns that it will be an inevitable consequence of a unified regime. A key concern expressed would be the matters considered to be material to an application under a unified consenting regime. There would be significant risks that historic environment considerations

would be diluted by, or become subordinate to, the wider considerations that would be material to the determination of a unified application.

We have in Wales recently gone through an extended process of consultation about the historic environment, which has led to the Historic Environment Wales Act 2016. This could have provided an opportunity to introduce a unified consenting regime if it was felt that this would contribute to the aim of improving the management of the historic environment. We believe that a unified consenting regime would negate the progress achieved on historic buildings under the 2016 Act.

The value of a separate listed building process is summed up by the comments from the Ancient Monuments Society: "listed building consent is important precisely because its whole premise is the protection of the historic environment." The comments by Allen Firth at paragraph 13.123 of the consultation document are also very relevant. While he notes that new processes could mirror existing requirements, "these are mechanistic and cannot, in themselves, guard against the subtle psychological shifts in the profile that stand-alone LBC applications currently enjoy." As the consultation document recognises: "much would depend on management attitudes and priorities within each authority." This is not reassuring.

In relation to paragraph 13.42 of the consultation document, the following case study illustrates how the unification would not be beneficial: “In the Pembrokeshire Coast National Park there was a major proposal for a leisure development which included use of a listed building (Blackpool Mill) and which included restoration works to the listed building. Consequently there was an application for planning permission for the development and an application for listed building consent for the restoration works to the listed building. The outcome was that planning permission was refused for the development application but approval was granted for the listed building consent application.

While we are given some assurance that the existing levels of protection will be ensured, we consider that while there might be some assurance on paper, there is no guarantee of this in practice. Therefore based on the information provided in the consultation document, our existing position and the information and views provided by our members, RTPI Cymru does not support the unification of listed building consent and planning permission

13.67 *Chartered Institute for Archaeologists:*

[S] [C] [E]

13.1.1 No. We will consider listed building consent and conservation area consent separately.

<u>The merger of listed building consent with planning permission</u>: While the arguments in the proposal would seem logical and persuasive, we strongly disagree that it would, overall, achieve the desired outcome of simplification or retention of existing levels of protection for the historic environment.

No doubt provisions relating to listed buildings could be replicated within the wider planning system (although the need to provide special treatment for listed buildings

within the general planning system begs the question whether such an approach would in reality be more accessible, effective or efficient). However, little, if any, evidence has been produced to suggest that the relatively small number of overlapping applications dealt with each year in Wales has actually been problematic, produced inefficiency or made the system less accessible for the public. Indeed, if an electronic submission is filed for both listed building consent and planning permission then only one set of application forms and supporting documents is required.

Such reform in practice risks devaluing listed building status. The need for a separate application for listed building consent makes the differentiation between listed buildings and other buildings and land clear at the outset and emphasises the importance of the former. Additionally, having a separate process emphasises and ensures that listed buildings are given the special regard required by the statute within the context of assessing development proposals.

Addressing the aims in seeking to unify consent regimes with planning permission identified at paragraph 13.7 of the review (in reverse order) – whether or not it simplifies the legislative framework (and the large number of technical amendments required suggests that it might not), we have seen no convincing evidence that it would reduce bureaucracy, and make the system more efficient; make the system more accessible or operate effectively alongside existing management systems, while there are real fears that in practice it would herald reduced levels of protection for the historic environment.

In addition, the full implications of these (and other) proposals within the review for the operation of the system of ecclesiastical exemption in Wales need to be considered and addressed.

Heritage development: We are also concerned at the proposed definition of 'heritage development' effectively as confined to buildings. We appreciate that this term is proposed to serve a particular purpose in relation to listed building and conservation area consent, but it would be unhelpful to have such a definition in legislation which on its face excludes development affecting such a large proportion of historic assets (both designated and undesignated).

The merger of listed building consent with planning permission as described in the proposal would have far reaching unintended consequences which could result in the damage and loss of parts of our historic environment. The recent Historic Environment (Wales) Act 2016 revised heritage protection in Wales and has yet to fully implemented. It would seem premature further to revise planning law with respect to the historic environment until the Act has been sufficiently tested and the implications of Brexit have been fully established

13.68 *Institute of Historic Building Conservation (IHBC):* [F] [E]

We do not consider that Listed Building consent is suitable for unification with planning permission and do not support this main aspect of the heritage considerations in this consultation. The two approvals exist for entirely different reasons and each is considered on a different basis. We have seen no evidence that unification of the consents will deliver better outcomes. Conversely, there may be a risk that it could lead to worse outcomes for listed buildings.

Each type of application is considered on a different basis, and even where there are overlaps in practice, that does not mean either (or both) are redundant, or that their unification will produce other more efficient or more beneficial outcomes, not least given the specialist knowledge required for each. Clear strengths in the current situation are that the wider considerations at large in Planning applications need not apply to the specialist consideration of Listed Building Consent processes. We have seen no evidence to support the principle that unification of the consents will deliver better outcomes overall for either aspect in the planning process.

The proposed amendment does reflect changes relating to the Institute's response to the earlier Scoping Paper consultation that the definition of development would need to be extended to include a definition of "heritage development" even if it leaves the definition of "development" and associated provisions unnecessarily complex.

If the intention of merging the two consents is to avoid double handling of applications in certain cases then an alternative solution could be proposed, as we suggested previously, which removes the need for additional planning permission in cases where Listed Building Consent is already required rather than a complete merger. The Advertisement Consent regulations confer Planning Permission on anything that has advertisement consent, and opportunities of doing the same through the Listed Building regulations could be explored, excepting changes of use.

By absorbing the special regard to the historic environment into a "general duty for planning functions" risks a degree of scrutiny being be lost if all heritage development is lumped together under a "development" definition. In practice, the issues involved can be subtly different. The indication is that it is not only s66 consents that are covered by this, but all consents.

The proposed Planning Code should be clear that the character of a listed building includes aspects of its setting that contribute to its character and buildings and structures within its curtilage.

If unification of consents were taken forward, it would have implications for the issues raised in question 8-1 of the consultation, in terms of the items to accompany applications that should be prescribed in regulations to ensure that consideration of heritage issues (statements of significance/heritage impact assessments/specialist reports) are included.

The Code should include clarification of the correct approach for a decision maker in dealing with the application of the duty, to have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses, under section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 with particular reference to a requirement to obtain specialist advice in reaching decisions in relation to heritage development.

13.69 *Institute of Historic Building Conservation (Wales):*

[F]

Primarily, for IHBC Wales Branch, we would wish to respond in relation to Chapter 13 of the consultation: 'Works affecting Listed Buildings and conservation areas' and

the proposed merger of Listed Building Consent (LBC) with Planning Permission (PP). We have serious concerns regarding this proposal and wish to register our strong objection.

While the system in Wales is similar to that in England there are some differences, mostly consolidated by the recent Historic Environment (Wales) Act 2016. The current proposals appear to start on the premise that simplification, consolidation and modernisation of the system is required. These proposals have no real understanding of the role of the present consent regimes or recognise that there has been sensible, well thought out and toughly consulted on modernisation of system through the recent Historic Environment (Wales) Act 2016 together with up dated Welsh Government Guidance.

The basis of the proposals would be to merge LBC with PP, by way of extending the definition of development to cover all works currently requiring LBC. This would mean that works which affect the 'special interest' or 'character' of a listed building but which aren't development (such as the removal of an historic staircase) which currently require an LBC application but not planning permission would in the future be classed as development and therefore require PP.

We welcome the stated intention to maintain the National Amenity Societies role as statutory consultees in the proposed reformed system. However, IHBC Wales branch foresees unintended consequences of these proposals, which include:

Loss of special status of Listed Buildings: The objective of PP is to 'encourage sustainable development' whilst LBC's objective is 'about managing change to retain significance'. The separate process for LBC signifies to the applicant and decision-maker that they are dealing with something sensitive and valuable and that all due consideration should be given to preserving the special interest and character of the building. To have a single regime for the construction of a household garage and the demolition of a listed building would downgrade the significance of the listed building and undermine the premise that these structures are recognised as being of national significance. A listed building is like a piece of upstanding archaeology once damaged by ill- considered works it has lost much of the value to the nation.

We are concerned that consideration for preserving the historic environment would become a secondary issue to general planning considerations, particularly to the overarching presumption in favour of sustainable development outlined in Planning Policy Wales. This presumption is often at odds with the current requirement for decision makers to have 'special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'. There could be no guarantee that there would be no inadvertent dilution of heritage protection.

Impact on local authority expertise: If these proposals were enacted, we are concerned that there would be further loss of local authority conservation and archaeology specialists as conservation is side-lined and applications decided by planners with little or no experience or expertise in building conservation. The current trend of reducing specialist staff and making savings through staff reduction makes this a very real possibility.

The consultation notes this concern but suggests it should be a matter for guidance and influence from professional bodies. There are provisions for both of these currently in place but in practice these provisions make little difference when local authorities are faced with making considerable savings due to vastly reduced incomes.

Please note the requirement of Planning Policy Wales for listed building decisions to be taken at a local level (TAN 24, 5.20) and the use of "specialist knowledge and skill" required to "sustain the special interest and significance of a listed building through the process of alteration, extension or re-use" (TAN 24, 5.14).

There would therefore be a serious risk that consideration for preserving the historic environment is not given the 'considerable weight' or 'special regard' that is required in decision making, simply through lack of specialist knowledge and expertise. This would lead to a side-lining of heritage concerns, a reduction in the quality of decision making and would not fulfil the legal requirements for the protection of our heritage assets.

Legal ramifications: Carrying out works without Listed Building Consent is a criminal offence, whereas is it only considered as a civil matter under planning permission. Sanctions for carrying out work without LBC can be serious, whereas retrospective consent is usually given for planning permissions. It is difficult to see how these opposing structures could be amalgamated without creating a more complicated and confusing system.

Increase in bureaucracy: IHBC Wales consider that the current proposals would not achieve a simplification of the current consent regimes but would in fact, in some instances, make it more complicated and lead to inadvertent damage to the historic environment and a further burden on planning authorities through increased enforcement actions. We also consider that 'modernisation' has already achieved through the 2016 Act.

In summary, we strongly object to the proposal to merge LBC and PP since we conclude that the merger of Listed Building Consent with Planning Permission as described in the proposal would have far reaching unintended consequences which would result in the eventual long term erosion and loss of parts of our historic environment, directly conflicting with the requirements of the Well-being of Future Generations Act (2015) for a "society that promotes and protects culture, heritage and the Welsh language".

There would therefore, as a result of this, be serious long term unintended consequences for the Welsh economy and tourism. Heritage Counts Wales 2016 notes that the heritage sector in Wales supports over 40,500 jobs (2.9% of Welsh employment) and contributes around £1.8 billion in output and £932 million to Wales's national gross value added (2.8 per cent of the Welsh economy), thus contributing over twice as much to the economy as the agriculture sector. 59% of Welsh people visit a heritage site every year and in 2015-16 Wales' historic environment attracted 3.3m visitors from other parts of the UK, and 61% of overseas visitors said they came specifically to see historic buildings and ancient monuments - some 591,000 people spending over £250m.

13.70 *Chartered Institute of Building:* The CIOB is of the mind that where the historic environment is concerned these proposals would entail merging Listed Building Consent (LBC) and Planning Permission (PP). Presently PP is about sustainable development and LBC is about managing change in order to retain or enhance significance. These are different emphasises and will result in the special nature of listed buildings being obscured. Listed buildings require expertise of a certain kind and there are many occasions today where the wrong expertise is deployed, but the need to obtain LBC does highlight that historic building expertise is required and often results in it being deployed. If there wasn't an LBC process, this emphasis would be lost. As a society, we need to ensure that greater expertise is deployed in this area and not develop a system that will no doubt result in less expertise being deployed or at least put that at grave risk.

Where local authority advice and assessment of applications of work to listed buildings is deployed, there is also a risk that Local Planning Authority development control staff will deal with the 'Planning Applications' and not Conservation Officers, whereas as now at least when it is called a 'Listed' building consent application, it readily highlights that the building has a special nature that requires expertise to deal with it.

The CIOB is very supportive of the Historic Environment (Wales) Act 2016 as a progressive step in the management of the historic environment in Wales, but see this proposal as a backward step.

Archaeological trusts

13.71 *Gwynedd Archaeological Trust:*

[E] [F]

13.72 *Dyfed Archaeological Trust:*

[E] [F]

We have several concerns regarding the merging of listed building consent and planning consent. Our main concern centres on the loss of the special quality of listed buildings if a merger of the two consents is implemented. If a merger were to go ahead then we would expect to see the listed building special qualities recognised and flagged up at the very beginning of the consent process, rather than listed building consent becoming subsumed into planning.

Specialist conservation bodies

13.73 *Royal Commission:* In response to the current consultation on Planning Law in Wales, we would like to comment on the proposal to merge Listed Building Consent (LBC) and Planning Permission (PP) into a single process.

We understand the rationale for doing this – the desirability of simplification, consolidation and modernisation of the planning process – but we are concerned about the unintended consequences. We believe the desired effect could be achieved more simply by means of a reverse takeover: that is to say, let Listed Building

Consent subsume Planning Permission and avoid duplication that way rather than vice versa. In other words, we would support the extension of Listed Building Consent to cover all aspects of Planning Permission, and not the other way around.

Why do we feel so strongly that LBC and PP should remain separate? It is primarily because the two systems have an entirely different philosophical basis and merging them is likely to lead to the loss of the special character and purpose of Listed Building Consent, which was so long and hard fought for in the early days of the conservation movement.

Put simply, Planning Permission is permissive – its aim is to 'encourage sustainable development' – in other words the aim is not to stop development, but to try to ensure that is managed effectively. In planning, it is perfectly possible to say 'yes' to developments that result in the destruction or demolition of existing buildings in the interests of a greater benefit to society.

Listed Building Consent is different: listed buildings have been specifically singled out for protection: society has made a decision that these very special buildings will not be demolished or altered even if persuasive arguments can be made that something better can take their place. An argument often used by developers who are frustrated by their responsibilities towards a listed building they own is that society can gain by its replacement – 'we can build affordable homes for 20 on the site of one shabby and neglected Regency building, of which there are many more examples in the world'.

That is indeed an argument that could be persuasive in a planning context: in a Listed Building context it is not an admissible argument – listed building status immediately puts a stop to any such proposal. Yet if the two systems are merged, it is inevitable that the differences will not be maintained and the distinctions will become blurred, resulting in the loss of the special status of listed buildings. We are not at all convinced that the subtleties and detail involved in decision-making about listed buildings and their setting – the need to understand what is significant about the building and ensure that that is protected and enhanced – would survive the more 'big picture' approach that is involved in planning.

We fear that the preservation of the historic environment would become a secondary issue to general planning considerations, particularly to the overarching presumption in favour of sustainable development outlined in Planning Policy Wales. It is precisely because of this danger that LBC was developed as a separate planning tool in the first place, and to roll back the clock would be to return to an era where buildings of special historic and architectural character lacked protection.

[E].

Efforts have been made by the Law [Commission] to ensure that none of this happens, to maintain the special character of LBC and to ensure that conservation specialists will not be squeezed out of the system, but the safeguards that are proposed only tend to make the merged system more complex, not less, that at present. We support the idea of simplification and reduction of bureaucracy in relation to PP and the various heritage consent regimes, but the current proposals would in some instances make the system more complicated and confusing.

As a final point, we would stress that Wales has an excellent and progressive new Historic Environment Act which was passed in the Welsh Assembly after a great deal of scrutiny and amendment. Throughout that process the concerns expressed by Welsh Assembly members did not revolve around complexity or duplication – their concern was about increasing the protection for listed buildings and ensuring through the statutory use of Historic Environment Records, that the decisions should have special regard for designated status. That 2016 Act would be fundamentally undermined by the current proposal and the clearly expressed intentions of Welsh Assembly Members would thus be frustrated. Let us leave well alone and let the world-leading 2016 Act be given a chance to succeed.

13.74 *Wales Heritage Group:*

[S]

the WHG has significant concerns with the proposals in Chapter 13 which suggests merging listed building consent and conservation area consent with planning permission, resulting in a single consent process. The Group does not consider that the proposals as suggested would achieve the undertakings as expressed in the consultation document and as set out above. This will be addressed in more detail below.

In addition, the WHG has misgivings that the consultation does not clearly set out what the issues are with the current system and provide evidence that these are problems which need to be solved. The Group considers that the current Listed Building Consent regime, which has now been in place for nearly 30 years, is well understood by owners, agents, developers and relevant others. There is an ample range of accessible guidance, policy and advice readily available. Within the consultation there is much emphasis on the views of consultees but little in the way of supporting evidence or analysis of the current system.

This perceived issue would potentially be better dealt with by providing specific guidance on how to administer joint applications.

The review suggests that works to listed buildings which would currently require Listed Building Consent would instead require planning permission for 'heritage development'. It seems to the WHG that this would not simplify the system but in fact make it more complicated and confusing to owners, developers and agents. The definition of development has been well tested by case law and it would seem that there could be unintentional implications if the need for a 'heritage development' permission was to be contested in the future. For owners of listed historic buildings to understand that they would require planning permission for the same works which their unlisted neighbours would not, would again seem to be complicating the system, increasing bureaucracy and making the system less accessible. It would potentially result in inadvertent unauthorised works to listed buildings and an increase in enforcement work for local authorities.

The review and consultation has indicated that the difference in legal status between unauthorised works which would have required planning permission (civil offence) and those which would have required listed building consent (criminal offence) could be solved by a provision that the carrying out of 'heritage development' without

planning permission is a criminal offence while the carrying out of 'development' without planning permission would continue to be a civil offence. Once again, the WHG feels strongly that this is simply confusing for the general public and owners and that in appeal situations it would potentially result in many more defences of ignorance, which is not restricted for listed buildings as it is for scheduled monuments. Understandably, with diminishing resources, where local planning authorities feel that there is little chance of prosecution, they will rarely proceed with enforcement action. This will therefore, in the long term, be detrimental to the historic environment and not fulfil the stated aims of this review.

If the review is to be comprehensive and achieve the simplification required, there are several technical areas which are currently often areas of misunderstanding or dispute and which would benefit from review but which have barely been addressed by the proposals. These include: definitions of curtilage for listed buildings; definition of what constitutes demolition; the position for fixtures and fittings; permissions relating to creating or replacing hard standing within the curtilage of a listed building, amongst others.

13.75 *Wales Heritage Group:* We note the consultation includes certain undertakings, namely:

- to result in efficiency savings and improvements to procedures;
- simplification of the legislation to improve clarity, accessibility and coherence of the planning system;
- it must maintain at least the current level of protection;
- it must operate effectively alongside existing management systems;
- it must make the system more accessible;
- it must reduce bureaucracy, and make the system more efficient;
- it must simplify the legislative framework; and to
- remove unnecessary complexity or inconvenience for those who have to use it.

<u>Replication of review</u>

The recent Historic Environment (Wales) Act 2016 comprehensively revised the heritage legislation and supporting guidance in Wales and was completed following a wide-ranging and in-depth consultation with all relevant parties. We would question why, if there was a need for change, the lengthy process of introducing, refining and adopting this legislation did not include it at the time? We would also question the use of resources and implication for resources of this current review since it was made abundantly clear that the HE(Wales) Act 2016 needed to be cost neutral.

[P]

Maintaining existing levels of protection

Development plan policies must have regard to current national policies which include those relating to the historic environment, but they must not duplicate national policy. (It is only through this consideration of national policy or through the inclusion of specific policies within the development plan that undesignated heritage assets receive some protection.) There is no explicit duty for authorities determining applications for listed building consent to consider the development plan, although they must consider "the extent to which the proposed works would bring substantial community benefits for example, by contributing to the area's economy or the enhancement of its local environment" (TAN 24, para. 5.13). It is only thus, that the historic environment becomes a material consideration for decisions on planning applications. Without the specific Planning (Listed Building and Conservation Area) Act 1990, which triggers the need for Listed Building Consent and for authorities to have 'special regard to the desirability of preserving the [listed] building or its setting or any features of special architectural or historic interest which it possesses', this duty would fail and the protection of the historic environment would be diluted in favour of the overarching planning principle of sustainable development. Listed Buildings would simply become another 'material consideration' of equal or lesser weight. Having a separate process emphasises and ensures that listed buildings are given the special regard required by the statute within the context of assessing development proposals. The objective of planning permission is to 'encourage sustainable development' whilst the objective for Listed Building Consent is to 'manage change to retain significance'. Whilst theoretically these should be complementary and mutually supporting objectives (what can be more sustainable than reusing an historic building with all of its embodied energy?) in practice it is only the separate consent process which ensures that the economic, social, cultural, historical, architectural, archaeological, associational, aesthetic and community values of historic assets are identified and protected. The quote in the consultation (para. 13.58) from the House of Commons ODPM Housing, Planning, Local Government and the Regions Committee, 2004 report on The Role of Historic Buildings in Urban Regeneration, amply demonstrates the bias towards growth and development at the expense of the historic environment by those who have responsibility for scrutinising decisions regarding housing, regeneration and planning.

Over 90% of the historic environment is undesignated. Some undesignated assets are of equivalent or greater importance to those which are designated. The planning process is a vital tool for identifying previously unknown assets through processes such as archaeological assessment and evaluation. Local authority expertise in the form of heritage specialists are essential within the development management process for identifying undesignated heritage assets of significance and specifying appropriate management or mitigation. The further loss of these specialists would therefore result in potentially significant heritage assets being unrecognised and lost. This would clearly not maintain the existing levels of protection.

[E]

The definition of the historic environment in TAN 24 (para. 1.7) and Cadw's *Conservation Principles* (para. 1.1) emphasises the diversity and range of historic assets and their indivisibility from each other. The WHG is concerned that the

complexity of the historic environment is not recognised in this review's distinction between listed buildings and scheduled monuments. Many structures are both listed and scheduled, acknowledging that they have both archaeological and architectural / historic interest, indeed buildings can be referred to as standing archaeology. The removal of Listed Buildings from specific heritage legislation would further acknowledge this remove, which is inaccurate and misleading. Impacts of development often have to be assessed across a range of historic structures, sites and landscapes, using an holistic approach to assessing impact on a multi-layered historic environment. To separate out one particular type of historic feature would therefore have a potentially negative impact on the wider historic environment, thereby not maintaining the existing levels of protection.

The separate systems of planning permission and listed building consent allow for different considerations to be taken into account in decision making. It is currently perfectly possible that an application for the change of use and works to a listed building might be acceptable in planning policy terms and even desirable from an economic and community perspective but that the details of the works would be unacceptable in heritage terms. In this case planning permission may be granted, or at least it could be indicated to the applicant that it would be looked on favourably, and thereby used to encourage the applicant to improve their application in order to gain listed building consent. This is a powerful negotiating tool for protecting the historic environment and especially for those structures which are perceived as 'problem' buildings or buildings at risk. Should the two consents be merged then this tool would not be available to local authorities, resulting in a potential lessening of protection and loss of heritage assets.

In summary the Wales Heritage Group strongly objects to the proposals to merge listed building consent and conservation area consent with planning permission. It does not believe that this proposal would achieve the stated aims of the review, that it is premature in light of the implementation of the Historic Environment (Wales) Act 2016 and the lack of analysis of the alteration of the planning system in England, and in particular would:

- result in a lessening of protection for the historic environment
- result in a lessening of the acknowledgement of the special status of listed buildings
- result in a more complicated and confusing and less accessible planning system, especially for the general public
- result in increased bureaucracy and increased workload for local authorities
- require resources which are currently under threat or diminishing
- not be based on established evidence of problems with the current system
- not be comprehensive in relation to those areas of the legislation which require review.

13.76 *Society for the Protection of Ancient Buildings:*

[E] [C]

Before we discuss the proposals and their implications, we feel it ought to be stated that we do not believe that adequate evidence for the need of this reform has been presented. No data has been produced to suggest that the relatively small number of overlapping applications made for both listed building consent and planning permission have been overly problematic in terms of inefficiency or accessibility for the public.

The arguments made in the proposal are not entirely without merit and might seem logical and persuasive. However, crucially, we do not agree that the proposals would ensure that the existing level of protection for heritage assets would be maintained, or that the desire for simplification of the system would be attained.

Fundamentally we consider that the requirement for listed building consent is based on a different ethos and legal basis than planning permission. Planning and development-control relates to the need to regulate land use and promote sustainable growth. The listed building consent regime exists primarily to protect nationally important buildings, and secondarily allows for the appropriate management of change to bring buildings back into use, or to change their use to contribute to an LPAs plan for growth. We anticipate that the separate purposes of the two consent systems would be obscured by their being merged and that the requirement to have 'special regard to preserving or enhancing' listed buildings during decision making could be lost to the growth agenda.

The aims of this proposal as set out in 13.7 – that the legislative framework be simplified, the system be made more accessible and that the existing levels of heritage protection are upheld – have not been met by this proposal. There is not evidence to suggest that on a technical level bureaucracy would be reduced, no evidence has been presented that the system would become more accessible and, as our response makes clear, we have very grave concerns that this reform would in fact diminish the level of protection for the historic environment.

Heritage development: The proposed definition of 'heritage development' is effectively confined to buildings. Whilst we understand that the definition serves a purpose in relation to listed buildings and conservation areas, as we have already discussed above, it would be unhelpful to have a definition set out in legislation which excludes development affecting all other heritage assets – both designated and undesignated.

13.77 *National Trust:*

[F] [E]

The National Trust in Wales operates within the legal planning framework and undertakes works to the highest possible standard at all of our properties. We take our guardianship of these heritage assets seriously and recognise their significance individually but also as a finite resource within the historic environment. Listed

building consent is important as a defined statutory framework as its whole premise is the protection of the historic environment.

The proposals to simplify listed building consent and planning under the Option 5 proposal (one consent), is a radical attempt to 'simplify' the process and harmonise the legal language. There are a number of general points we would like to make in this respect that we feel should be considered.

By proposing Option 5 there is the suggestion in language that planning is preeminent to listed building consent and this should be resisted. There is also an issue of language in the current system. Generally planning permission is felt to come with an assumption it will be granted whereas LBC comes with an understanding that the case must be made for change. If LBC were to be removed as a term, not only does it weaken the specific legislative protection, but it also changes the public perception.

Perhaps the difficulties around LBC are not predicated on change to the whole system but on consistency across Wales and levels of detail required. Currently local authority provisions vary across the country. This in turn leads to different requirements on applicants and interpretation of the legislation by local authorities. It could be argued that the LBC process requires consistency and application, rather than its subsuming into planning permission. For example a building that is listed which has had uPVC windows inserted at time of listing requires an applicant to submit detailed drawings in order to replace those windows. This is a level of detail that feels unnecessary as those windows will have had no impact on the assessment of significance and, as such, should not be subject to the same stringent control when replacing an historic window. Underpinning all of this is the provision of expertise and knowledge. It can be argued that this provision is already diminished and will only be diminished further should this proposal be brought forward. The current level of specialist staffing across Wales has reduced as a result of budgetary pressures and 'simplification' would further reduce the need for expertise and adequate resource for the successful management of the historic environment.

In its current form the proposal put forward would diminish expertise and put at risk the significance currently afforded the historic environment in Wales. The unintentional consequence would be that the historic environment would be diminished as a consideration within the planning regime and there would be a reduction in the quality of decision making. In relation to the proposal in Chapter 13 we do not see the benefits of merging listed building consent and conservation area consent with planning permission and do not support the proposal put forward.

13.78 *Ancient Monuments Society:*

We previously commented on a Scoping Paper for the proposals which you published in October 2016. Many of the comments we made then are repeated in this response. We continue to be very alarmed by the prospect of listed building consent being merged with the broader planning regime for the following principal reasons:

1. Historic Environment (Wales) Act 2016: the new heritage Act for Wales (with associated policy and guidance) has been very well received by a wide range of users, including planners, heritage specialists, developers and building owners. It has also been successful in the devolution of planning legislation. We cannot imagine

why the Welsh Assembly would want to undo such exemplary work by putting forward a proposal which would undermine one of the founding principles of the heritage protection system.

2. Special status of listed buildings in planning: Listed Building Consent is important precisely because its whole premise is the protection of the historic environment. The fact that there is a separate regime makes it clear to applicants and decision-makers that they are dealing with sensitive, valuable, precious structures. It is fundamentally different in its legal basis and ethos from Planning Permission. To have a single regime for the construction of a utilitarian industrial shed and the demolition of a listed building is to downgrade the significance of the latter.

3. Limiting and controlling change: there is a presumption within the planning regime in favour of sustainable development (see, for example, Planning Policy Wales, Paragraph 4.2.2.). Listed Building Consent allows for proposals which commit "substantial harm" to be refused and is about managing change. Planning Permission is about encouraging it.

4. Sanctions: acting without Listed Building Consent is a criminal offence, whereas acting without Planning Permission is simply a "planning breach". Sanctions can be severe, requiring the breach to be undone (although the majority seem to win retrospective Planning Permission), but the breach is not itself a criminal offence.

When considering works of alteration, extension and demolition of listed buildings there is a statutory duty to have special regard to heritage considerations, whereas there is only ordinary regard for planning considerations. Parliamentary draughtsmen clearly recognised that particular attention needed to be paid to the primacy of preserving and protecting a finite resource. Would the abolition of Listed Building Consent have any unexpected consequences on Repairs Notices?

5. [C]

6. Internal works: Listed Building Consent is required for many changes to a listed building that do not need Planning Permission. Above all this is for internal works. Planning Permission is needed for "material change" which by definition is external (works affecting the external appearance, environment, the use). A building owner does not need Planning Permission to sell a fireplace or pull down a plaster ceiling, for example, but such interventions do require Listed Building Consent.

7. Increase in bureaucracy: the document makes play of the fact that the regularisation should reduce the work of local planning authorities, but the number of planning applications would inevitably rise as stand-alone Listed Building Consent proposals would have to be submitted as Planning Permissions.

8. [F]

9. [E]

For the reasons stated above, we urge you to reject the proposal to merge Listed Building Consent with Planning Permission, which we believe would only serve to

undermine the heritage protection system in Wales. We strongly disagree that bringing the two consent regimes together would be beneficial.

13.79 *RESCUE, British Archaeological Trust:* RESCUE is concerned about proposals within the Welsh planning law revisions to merge Listed Building Consent with Planning Permission. Whilst we understand, and have some sympathy with, the intention to produce a simpler and more holistic system, we are concerned that such an action may have unintended consequences. The purpose of Listed Building Consent is to ensure that any change to a protected historic structure is carried out with adequate consideration of the significance of the building, without any underlying requirement to encourage sustainable development. By keeping the consent process separate from planning permission, the unique and vulnerable character of historic buildings is recognised and highlighted. RESCUE believes that any merging of the two risks the special nature of listed buildings being subsumed by the bulk of the general planning process.

[E]

13.80 *Aberystwyth & District Civic Society:* The Civic Society views with concern the proposal to merge listed building consent and conservation area consent with planning consent in Wales.

Firstly, listing is a formal recognition that the designated buildings have special status as nationally important buildings. Listed buildings have significance for all and this is reflected in the current separate arrangements for listed building consent applications for which a fee is not charged. Listing has been essential for preserving the historic Victorian and Edwardian character of Aberystwyth. The system of listed building consent has worked well for the town and there have been few significant unauthorised works. We, as a civic society, are involved in the process as consultees. More broadly, the statutory consultees (Royal Commission (RCAHMW), Victorian Society, Georgian Group) are important for authoritatively informing decision makers as to the impact of proposed changes. The present system has worked well and continues to do so. It is appropriate to repeat the cautionary saying: "If it ain't broke, don't fix it". The merging of listed building consent with planning permission will inevitably erode the special public status of listed buildings in the planning system, especially when there are multi-stranded development and regeneration schemes.

[E]

13.81 *Manchester Civic Society:* We have grave concerns at the proposal (in Chapter 13 of the document) to merge listed building consent with planning permission. We believe that the loss of separate listed building consent will lower the profile of listed buildings in the documentation supporting a planning application and result in determinations less favourable to protection of these heritage assets.

We are very aware that, as Wales increasingly creates for itself a legislative role which is distinctive from England, these Welsh initiatives can lead the way for England to follow, for good or ill.

It is difficult to see any evidence that this proposal, which carries serious risks to heritage assets and their settings, would lead to a measurable improvement of the planning process. We feel that, at the very least, there should be a serious impact assessment of any such proposal, particularly as such a change will be irreversible. It will not be possible to put this genie back in the bottle, however desirable that may, in hindsight, be discovered to be.

Our Civic Society's comments are informed by fifteen years' experience of attending numerous planning committee meetings, both in Manchester and Bolton, on behalf of voluntary residents' groups and civic societies, together with liaison with other civic societies and heritage groups including national and regional ones.

[E]

The elected members who make the decisions at planning committees are also hard-pressed. The sheer volume of just the officer's reports that are produced for each planning committee is such that it is challenging for councillors just to read those alone, without probing further into the background documents.

This is the environment in which a proposal affecting a listed building is set. It is one in which all those whose role it is to further the public interest are increasingly hard-pressed. It is one in which the challenge to preservation of heritage assets is increasing, with the default position increasingly in favour of 'sustainable development'.

Increasingly, planning applications are monetarised. Obviously, a planning gain is to be expected, otherwise the proposal would not be worked up in the first place. Various mechanisms exist which attempt to take a piece of this gain for the community. These include CIL, s106 monies, affordable housing and direct provision of facilities such as roads, schools and GP surgeries. Various strategies exist to resist such diminishment of gain, with the concept of viability being increasingly in vogue. In this context, the destruction of inconveniently sited heritage assets can be portrayed as a financially inevitable. But heritage assets cannot be valued in monetary terms; their value is in the tangible evidence of a nation's history, even its soul.

To remove the distinctiveness of the treatment of listed buildings into the general melee of a planning application will, we fear, be akin to 'breaking a butterfly on a wheel'. It risks sidelining consideration of heritage issues and ultimately pushing them into obscurity.

At the moment, any impact a proposal has on heritage issues is crystal clear to all concerned - the planners, any conservation officer, the councillors, the man in the street and the developer - because its status is flagged up by the procedure of listed building consent.

We hope that listed building consent will remain in place as a distinct part of planning applications affecting listed buildings, as we are firmly convinced that it is a cornerstone of their protection and preservation.

13.82 *Council for British Archaeology Wales:* [F] [E]

Primarily, for CBA Wales, we would wish to respond in relation to Chapter 13 of the consultation: 'Works affecting Listed Buildings and conservation areas' and the proposed merger of Listed Building Consent (LBC) with Planning Permission (PP). We have serious concerns regarding this proposal and wish to register our strong objection.

While the system in Wales is similar to that in England there are some differences, mostly consolidated by the recent Historic Environment (Wales) Act 2016. The current proposals are based on the premise that simplification, consolidation and modernisation of the system is required.

The basis of the proposals would be to merge LBC with PP, by way of extending the definition of development to cover all works currently requiring LBC. This would mean that works which affect the 'special interest' or 'character' of a listed building but which aren't development (such as the removal of an historic staircase) which currently require an LBC application but not planning permission would in the future be classed as development and therefore require PP.

We welcome the stated intention to maintain the National Amenity Societies role as statutory consultees in the proposed reformed system. However, CBA Wales foresees unintended consequences of these proposals, which include:

Loss of special status of Listed Buildings: The objective of PP is to 'encourage sustainable development' whilst LBC's objective is 'about managing change to retain significance'. The separate process for LBC signifies to the applicant and decision-maker that they are dealing with something sensitive and valuable and that all due consideration should be given to preserving the special interest and character of the building. To have a single regime for the construction of a household garage and the demolition of a listed building would downgrade the significance of the listed building and undermine the premise that these structures are recognised as being of national significance.

We are concerned that consideration for preserving the historic environment would become a secondary issue to general planning considerations, particularly to the overarching presumption in favour of sustainable development outlined in Planning Policy Wales. This presumption is often at odds with the current requirement for decision makers to have 'special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'. There could be no guarantee that there would be no inadvertent dilution of heritage protection.

Legal ramifications: Carrying out works without Listed Building Consent is a criminal offence, whereas is it only considered as a civil matter under planning permission. Sanctions for carrying out work without LBC can be serious, whereas retrospective consent is usually given for planning permissions. It is difficult to see how these opposing structures could be amalgamated without creating a more complicated and confusing system.

Increase in bureaucracy: CBA Wales consider that the current proposals would not achieve a simplification of the current consent regimes but would in fact, in some instances, make it more complicated and lead to inadvertent damage to the historic

environment and a further burden on planning authorities through increased enforcement actions. We also consider that 'modernisation' has already achieved through the 2016 Act.

Summary: We disagree that the proposals would simplify the existing processes or maintain the current level of protection.

In summary, we strongly object to the proposal to merge LBC and PP since we conclude that the merger of Listed Building Consent with Planning Permission as described in the proposal would have far reaching unintended consequences which would result in the eventual long term erosion and loss of parts of our historic environment, directly conflicting with the requirements of the Well-being of Future Generations Act (2015) for a "society that promotes and protects culture, heritage and the Welsh language".

There would therefore, as a result of this, be serious long term unintended consequences for the Welsh economy and tourism. Heritage Counts Wales 2016 notes that the heritage sector in Wales supports over 40,500 jobs (2.9% of Welsh employment) and contributes around £1.8 billion in output and £932 million to Wales's national gross value added (2.8 per cent of the Welsh economy), thus contributing over twice as much to the economy as the agriculture sector. 59% of Welsh people visit a heritage site every year and in 2015-16 Wales' historic environment attracted 3.3m visitors from other parts of the UK, and 61% of overseas visitors said they came specifically to see historic buildings and ancient monuments - some 591,000 people spending over £250m.

13.83 *Save Britain's Heritage:* SAVE strongly objects to a very alarming proposal set out in the consultation paper (in Chapter 13) to merge listed building consent with planning permission. We consider this change would have serious unintended consequences including the dilution of the special status of listed buildings and exacerbate the increasingly widespread under resourcing of skilled conservation officers in local planning authorities.

The separate process for listed building consent has been developed in recognition of the special status of these historic buildings – singled out on a national list of important, unique buildings. We share the concerns of many others in the heritage sector that the consideration for preserving the historic environment would become a secondary issue to general planning considerations if both systems were merged as 'heritage development' in the application process. This is particularly acute given the overarching presumption in favour of sustainable development set out in Planning Policy Wales.

We are extremely concerned that merging listed building consent with planning permission will result in watered down protection for designated heritage assets in Wales. In our view listing and listed building consent are inextricably linked. To end listed building consent will diminish the effectiveness of listing itself.

It is widely known that specialist conservation staff have been reduced by large numbers in recent years due to funding cuts across local planning authorities. Our real concern is that by removing listed building consent, the authority and expertise of conservation officers will be further diminished.

We also consider that the aims of this reform, one of which is simplification of the consents system, will not be addressed by this change. Planning staff have told us that the current use of dual forms for the overlapping listed building consent and planning permission (of which there are comparatively few), and the requirement for only one set of plans when submitting applications electronically has already reduced bureaucracy. The feedback we have received is that this is not a perceived problem – and does not need solving as set out in this proposal.

These historic buildings survive, mainly in fine condition, largely thanks to the well-established system of listed building consent. For the reasons set out above, we believe the merger of listed building consent with planning permission will diminish the architectural heritage of Wales and frustrate and impede the many people and organisations who care for it.

13.84 *Theatres Trust:* in our response to the previous Planning Law in Wales Scoping Paper consultation we raised concern on particular aspects of what was being proposed. In particular, we highlighted our objection to the merger of planning permission, listed building consent, conservation area consent, advertisement consent and potentially scheduled monument consent into a single consent which we felt would undermine heritage assets and the ability of planning authorities to protect heritage assets. As this proposal has been carried forward to this consultation, the Trust wishes to highlight its ongoing strong objection.

While we support many of the proposed amendments which appear to simplify the planning system in Wales and remove legislation that has become obsolete, we have a number of concerns about the effectiveness of merging planning permission and listed building consent.

[F]

The Trust strongly objects to these proposals, and would reiterate comments made during the previous scoping consultation. We feel that to merge planning permission with listed building consent and conservation area consent would undermine the status of Wales' heritage assets and historic environments, and would undermine the ability and duty of planning authorities to protect such assets.

The Trust is concerned that consideration for preserving the historic environment would become a secondary issue to general planning considerations, particularly to the overarching presumption in favour of sustainable development outlined in Planning Policy Wales. This presumption is often at odds with the requirement in the Planning (Listed Buildings and Conservation Areas) Act 1990 for decision makers to have 'special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'. The objective of planning permission is to 'encourage sustainable development' whilst Listed Building Consent's objective is 'about managing change to retain significance'.

To ensure that heritage continues to have the special protection in legislation, policy and guidance that is necessary under a merged application framework, the Act would require detailed content to guide the processing and determination of planning applications. Such content currently underpins listed building consent and conservation area consent; this would result in planning application guidance

becoming more complex, and we would argue unnecessarily so. The supporting documentation (paragraph 13.3 of the Summary) asserts that where two types of permission are required it results in two committee reports, appeals and enforcement notices amongst other things. In reality, multiple application types are handled by the same officer within a single report and managed under the same Inspector or enforcement officer if relevant. Expert advice is often provided by a Conservation Officer and heritage bodies who may also be statutory consultees. On that basis, it would seem sensible to maintain the three distinct types of application and this would provide greater clarity for applicants and also for interested parties. Without distinct reference to a listed building consent, it may not be clear that an application relates to works to a listed building and therefore the level and quality of response, scrutiny and advice from consultees may be diminished.

If Ministers are minded to agree to the proposals and merge these types of development into a single application, at the very least we request the special regard for heritage assets is not diluted and their protection continues to be given considerable weight in all decision making.

Individual respondents

13.85 *Andy Bramwell:* I was surprised and a little shocked to read in The Times on Wednesday 28th of plans by the Law Commission to abolish listed building consent in Wales. We have been alerted to it by Save Britain's Heritage. Our firm are project managers for buildings in the cultural and heritage sector and collaborate from time to time with heritage professionals on projects in Wales. They are alarmed by this proposed change, which can only result in detriment to the process of controlling and facilitating change to Wales's built heritage.

13.86 *Allan Archer:*

[C] [E]

I have noted the views set out in the consultation report both in favour of and against the proposed merger of LBC with planning permission and have come to the conclusion that I do not support the proposal.

I share the concerns expressed against the changes, insofar as abolishing listed building consent is concerned. I think the separate listed building consent and enforcement provisions are an essential component of the package of specific legislation which emphasises the important status of these buildings and ensure that the preservation of the building and impact on their setting and features are given special and discrete consideration through the listed building application process.

I can't avoid feeling that the special protection given to listed buildings by the current legislative provisions would be undermined by the option to merge LBC and planning permission.

While the complexities of the current arrangements are emphasised in the report it seems to me that to make the proposals work, other changes are needed which are also complex and may not be all that easy to understand.

On balance, I'd prefer option (4) as regards CAC.

On balance, I don't see a strong enough case to convince me that the reservations relating to the LBC proposal should be set aside and I'd prefer option (2). The existing LBC regime seems to have served the historic environment well.

One thing I would mention (bearing in mind para 13.42 of the report) is that recently in the Pembrokeshire Coast National Park there was a major proposal for a leisure development which included use of a listed building (Blackpool Mill) and which included restoration works to the listed building. Consequently there was an application for planning permission for the development and an application for listed building consent for the restoration works to the listed building. The outcome was that planning permission was refused for the development application but approval was granted for the listed building consent application. The advantage is that the landowner now knows that the internal conservation works proposed are acceptable from a LBC perspective and that he has the necessary LBC to proceed.

13.87 *Andrew Goodyear:* [F] The proposal to merge listing building consent with planning consent in an effort to reduce bureaucracy assumes there is a problem at the moment. Given the relatively small number of listed buildings compared to non-listed buildings I do not believe that this is so. In my view the proposals are taking a sledge hammer to crack a perceived walnut that probably does not even exist. In addition, applications for listed building consent are often for work that does not require planning consent. The proposals would result in a two-tier planning system that would only serve to muddy the waters, again inconsistent with the remit of the review.

The underlying assumption to the proposal to merge listing building consent with planning consent seems to be that they are logically trying to meet the same ends. This is patently not so. Planning is about managing development; listed building consent concerns the protection of our built heritage. Not only are they separate objectives, they can be in conflict. To merge the two is not only irrational but can only serve to weaken the fragile protection currently offered to our heritage. Planning consent is a fee-based system, listed building consent is not. Further, planning is subject to civil law provision whilst listed building consent violation is subject to criminal action. Resolving that conundrum will either result in weakening listed building protection or even more obtuse and confused planning regulation.

In summary the proposals to merge listed building consent with planning consent are trying to deal with a problem that is more perceived than real, are ill-timed when the new law has not been assessed and will complicate rather than simplify the system. Worst of all the proposals can only weaken the protection offered to our built heritage which is not what the review body was asked to achieve.

13.88 *Dr Martin Cherry, FSA:*

[F]

I am wholly in agreement with the consultation response made to you on 23 February, 2018 by the Society for the Protection of Ancient Monuments (their ref. SPAB/18/PLWales), views that are widely shared by the other statutory amenity

societies and others besides. Rather than simply repeat all the points made there, I would like to reinforce SPAB's answers to Q1.1-3:

Coming so soon after the welcome and deeply considered Historic Environment (Wales) Act 2016, the drivers here are clearly to simplify and streamline planning procedures. These are laudable aims, but in the process the recommendations would inadvertently run counter to the objectives of the heritage legislation (so recently passed) and undermine the protection of irreplaceable historic fabric. The ethos of the Town and Country Planning legislation recognises that the long-term interests of historic buildings are best served by their remaining in use, and that securing a sustainable future for them might involve their undergoing some alteration. (This was consciously set alongside the scheduled monuments legislation that considers monuments such as prehistoric earthworks or medieval ruins as too fragile and significant in their current state to be altered, and thereby removing them from the planning process.) By placing conservation generally within planning, listed building consent was seen by legislators as the key element in safeguarding those features of a listed building that gave it its 'special architectural or historic interest'. It is the only statutory mechanism that requires that specific consideration be given to a listed building's special interest. It takes specific (and carefully defined) conservation considerations temporarily out of the planning process which is concerned primarily with development . (The same argument applies to conservation area consent.)

To remove LBC would unwittingly erode the status of listed buildings as being 'special' and requiring special treatment (the use of more expensive traditional materials and repair techniques, for example). It is largely a matter of perceptions, and when I was a practising conservation officer (and later working with English Heritage) owners did not seem to be phased by the need to apply for LBC (and possibly planning permission in addition). They understood that LBC would help to secure a bespoke solution to achieving change to their building whilst respecting its character.

Listed building consent (and its equivalent for conservation areas) is a way of temporarily removing an important historic building from a planning process that is primarily concerned about managing change through development while the effects of proposed changes on its 'special interest' are given close consideration. Abolishing it (and charging for it) would undermine the levels of care we all want to provide for our historic environment - an unintended consequence that I'm sure we would all wish to avoid.

13.89 *[REDACTED]:* Wales has the highest proportion of listed vernacular buildings in the UK. Facilitating the process through which these buildings could be demolished would be a travesty.

[E]

13.90 *Lydia Inglis:* Alerted by SAVE Britain's Heritage, I write to voice my concern about the proposal to merge listed building consent into the planning permission process.

[E]

We are extremely concerned that merging listed building consent with planning permission will result in watered down protection for designated heritage assets in Wales. In our view listing and listed building consent are inextricably linked. To end listed building consent will diminish the effectiveness of listing itself.

Please re-examine the practical implications of this proposal - I hope common sense will prevail and that listed buildings in Wales will continue to be treated as the special, unique reflection of surviving history that they are.

13.91 *Mark Teale:* The proposal to scrap listed planning consent proposed by the Law Commission, in favour of allowing decisions on heritage protection to be considered as part of planning permissions, is clearly a retrograde step that will inevitably result in the iterative damage to current listed building stock accelerating. The authors of the Law Commission paper appear to have no appreciation at all of the destructive nature of their proposal and the way in which it will inevitably undermine the protection of what is left of Wales' fine period buildings. Planning authorities simply do not have the in-house skills or experience to make decisions by themselves during the planning permission process on what property should be protected let alone the weight that should be given to development benefits vs securing historic architectural legacies. The Law Commission's argument that scrapping listed consents is necessary because current constraints make securing planning permissions time-consuming misses the point. The process is necessarily time consuming to avoid, as far as possible, ill-conceived developments causing irreparable damage to our dwindling stock of fine period buildings. I hope that the Assembly is wise enough to see through this Law Commission promoted charter for a damaging development free-for-all in Wales.

13.92 *Pippa Richardson:* I am most concerned about the recommendation in Chapter 13 to merge planning permission, listed buildings consent and conservation area consent into one planning consent (para 13.5).

I oppose the idea of abolishing listed buildings consent. Listed buildings are tremendously important in the preservation of Welsh heritage, and any plans to demolish or alter listed buildings need to be considered very carefully. The Law Commission proposal would dilute the special status of listed buildings - I doubt that sufficient expertise exists within the everyday planning sector to give listed buildings proper consideration. In due course I believe this would lead to the loss and damage of listed buildings all over Wales. We need to value our listed buildings and take every measure to protect them.

13.93 *Molly Edwards:* Arguably, is it important to invest so much time in the study of built heritage and conservation if the legislation is going to be altered so drastically? The opportunity to work for an LPA was a career changing chance due to the reduction of jobs and vacancies evident in both England and Wales. One of the concerns I have with the merger is not simply the further likely impact on the profession, but the lack of influx of new professionals due to the dilution of protection for listed buildings. If you affect the legislation and management of the alteration of listed buildings, you risk affecting the number of students upon which the profession relies to maintain any professional in the conservation sphere.

As a building historian and conservation officer, the existing system ensures that the historic fabric, ranging from materials and architectural features dealt with on a more regular basis to the more specific and rarer elements such as paintings and decorative plasterwork for example, is protected in the detail necessitated by the Listed Building Consent process. The loss of this consent process places this sensitive and watchful management into a wider, varied and more political consent process where it would be diluted and side lined in favour of other considerations. Additionally, this merger proposes a weakening not strengthening of control with the potential for people to question the need to meet 'Heritage Development' requirements within a planning application process.

With regard to the concern over complexity of the current system, during my time with the LPA I have not felt that applicants or agents are confused by the requirement for two consents and what this entails, rather there is a desire to ensure they have everything in place which will enable them to carry out the works they are proposing. Furthermore, the figures for applications received for LBCs alone, in comparison to those with concurrent planning applications, are evidence enough to demonstrate that there is no problem to be solved.

Another major concern is without the proper understanding of the constraints and significance of listed buildings, people will not invest in the development of skills and understanding of built heritage, and the same will happen to the experts among consultants and agents if there is no regulation system which respects and acknowledges the importance of built heritage. Furthermore, people will not invest in the experience of those consultants and agents who have developed the skills to work with listed buildings, nor will they invest in the time it takes to develop said skills and experience as the regulatory system itself will not respect or value this experience. This will reduce the quality of the proposals being put forward to the weakened regulatory authorities.

13.94 *Neil McKay:* I am writing to express my strong concern over some of the changes to planning law in Wales which are currently proposed. In particular I do not believe that merging of Listed Building Consent with Planning Permission is either necessary or desirable.

In my experience householders are already frequently unclear as to the difference between LBC and PP. Merging them will only add to the confusion, and is highly likely to lead to many instances of inappropriate works being undertaken without understanding of the need for consent, or the different approach and priorities required when dealing with historic buildings. Given that carrying out unauthorised works to a listed building is a criminal offence and that enforcement after the fact will never be able to reinstate lost heritage, it is imperative that a separate process for LBC is maintained. LBC is also currently free. Many owner and developers already view restrictions on their freedom to alter a listed building as an expensive administrative burden. Requiring payment for PP for alterations will only serve to increase this perception, and encourage owners to attempt to circumvent the system entirely.

13.95 *[REDACTED]:* As a heritage professional I write to object to proposals to 'streamline' the current procedure for planning and listed building consent applications.

Removing any distinction between buildings in the application process is an irresponsible proposal that risks jeopardising Welsh heritage for future generations.

13.96 *[REDACTED]:* Wales has almost 30,000 listed buildings ranging from cottages to castles, railway stations and important remnants of Wales' industrial past. All are threatened by the proposed changes to the heritage protection proposed by the Law Commission and Welsh Assembly. Under these plans Listed Building Consent, which is required for the alteration or demolition of Listed buildings, would be abolished and merged with planning permission.

While the motives behind the changes to simplify the planning process are well intentioned, the unintended consequence would be the dilution of the special status of Listed buildings and other heritage assets in the planning process, resulting in potential for future significant irreversible harm or their loss entirely. To have a single process for the construction of an industrial shed and demolition of a Listed building by its very nature downgrades the importance of Listed buildings. The change would also exacerbate the problem of under-resourcing of both specialist conservation officers and staffing levels generally within planning authorities, an issue which resonates nationwide.

I would urge the Law Commission and Welsh Assembly to reconsider these damaging proposals. In addition to the potential loss of Wales' outstanding built heritage, it would also set a dangerous precedent for other devolved (and indeed national) governments within the United Kingdom to follow suit, with equally significant risks to the historic environment.

13.97 *Sir Donald Insall:* May I reinforce the concern of the major National Amenity Societies, already expressed, and of very many more local ones, a number of which I serve (particulars available) that the procedural changes under consideration would undeniably be most damaging for Wales and its unique heritage, while also incidentally in practice by raising so many new problems, only make today's planning-control situation more difficult and complex, rather than less so.

Having just been receiving compliments from overseas visitors about the excellence of our national heritage protection processes, this comes as an extra concern!

13.98 *Edward Lewis:* As a conservation architect, I find the proposals to merge Planning and LBC in Wales deeply disturbing.

The idea that all work should be considered 'development' betrays a view too often held by politicians and businesses, which regards listed buildings as economic commodities and contributors, rather than recognising their value as historic, social and cultural assets whose significance should be recognised and cared for. This is particularly true for Wales, which has 30,000 listed buildings, many of which for a range of reasons (including geography, relative poverty) have retained extremely significant historic fabric both internally and externally.

The proposal raises a number of questions; will owners of listed buildings now be charged a fee for applications for modest alterations, and is this simply a cash grab? Or will the definition of work requiring an LBC be diluted, putting historic fabric at risk? Will the assessors have the appropriate knowledge, skill and judgement?

Listed Building Consent creates clear requirements for applicants to legibly describe and illustrate proposals affecting listed buildings. This clear and separate understanding of the impact of works on historic fabric is critical, as is expert assessment. Even more so where submitted in tandem with a Planning Application for new development, where works to listed buildings can so often be (deliberately) understated; LBC affords a distinct level of legibility and accountability over proposals affecting historic fabric

LBC is already at risk of being ignored by building owners because of a popular misconception of its complexity and stifling requirements; creating a culture of under-the-radar corner-cutting works, combined with lack of expertise in the construction industry and even from many construction professionals, puts historic buildings (particularly those more humble) at risk of unsuitable repairs. Not receiving the proper professional advice regarding design, suitability of materials, assessment of significance, and technical performance can be quickly devastating for historic buildings and delicate fabric, and the process of obtaining the proper advice and consent should be as clear and helpful as possible.

As part of this, a clear and free LBC service - backed up by CADW guidance and advice - administered by experts within each local authority has made a real difference. In contrast, I fear that the Law Commission's proposals would be a step backwards.

13.99 *Janet Finch-Saunders AM:* I wish to raise my concerns to the proposal to merge listed building consent with planning permission. It is considered that this would 'dilute' the special status of listed buildings. Listed building consent, it is argued, has been a key factor in the retention and preservation of thousands of our much-valued historical assets, including listed buildings, gardens and towns (e.g. where the frontage of buildings is listed to preserve the historic and pleasing appearance of a particular town/street).

Within Wales, the historic tourism economy is considerable – particularly given the number of castles our nation is renowned for, and which constitutes so much of our Welsh culture and language. The protection of the architectural heritage of Wales is essential to our tourism economy – which makes up a considerable portion of our economy as a whole.

13.100 *Caroline James, Architect:* My concerns are:

1. Distinct irreparable differences between the legislation: Planning has presumption in favour of development where as good conservation seeks minimal works necessary for the survival of a listed building. Works that have the potential to affect the character and historic interest of a listed building are not even considered as development under planning law. Permitted Development Rights do not exist for listed buildings and Ecclesiastical Exemption does not include planning permission. Carrying out works on a listed building without prior consent is also criminal offence whereas non-listed buildings are just considered a breach of planning law.

[F]

3. Whilst the Historic Environment (Wales) Act 2016 is in it's infancy, many planning officers are utterly clueless as to when a Heritage Statement is required and even conservation officers asking for training on its content. These changes will undermine local conservation officers and perhaps devalue the status or listed buildings and the specialism required even further.

The construction industry is constantly lamenting the lost of heritage skills and these reforms will not help matters.

13.101 *Peter Thomas:* [S]

No. I object in the strongest possible terms to this proposal. Fundamentally it is unclear what the problem is that will be solved by the proposal.

The proposed definition of 'heritage development' is limited to works affecting the character of a listed building and demolition within conservation areas. This will discount a lot of 'heritage' and will lead to further (albeit different) confusion for applicants. Prima facie the proposed definition of development will ensure existing levels of protection will be maintained, however, this course of action will introduce new complexities. For example, development in the setting of a listed building; development within a conservation area or historic park/garden; development relating to scheduled monuments; or development affecting locally listed buildings will not be 'heritage development' but will clearly be development that will affect heritage.

Indeed, it is important to note that heritage extends far beyond the historic built environment and this is, quite possibly, a reason the Heritage Bill that was introduced by the National Assembly for Wales being passed as the Historic Environment (Wales) Act. Heritage can reasonably be considered to include inter alia culture, the Welsh language and tourism. Reasonably, a layman might assume that an application to convert an unlisted building that is not within a conservation area to create a museum celebrating the Welsh language might be considered heritage development.

Perversely, under the proposed definition development in a World Heritage Site will, usually, not be heritage development.

The paper identifies the importance of scheduled monuments and discounts these from the merged consent as a result. It also cites the expertise at Cadw who deal with applications for SMC. This might imply that listed buildings are not important, and the expertise of local authority conservation officers is less valuable than the expertise of Cadw officers.

A small number of Authorities benefit from delegation for the determination of Grade II (unscarred) listed buildings. For all cases involving Grade I and II* listed building and all buildings where delegation does not apply Cadw are notified of the recommendation of the LPA to provide an opportunity to call in the application. Will this still apply to the new regime? Will Cadw officers, who themselves are under significant pressures from existing workloads, be expected to delve deeper into applications which may now have significantly more supporting information to find the relevant parts?

The proposal cites the ‘unnecessary complexity or inconvenience for those who have to use it’’ that will be removed under a new legislative regime but doesn’t clarify what this is. In terms of duplication the planning portal already allow an applicant to submit a single set of drawings for both applications with almost all the duplication taking place in-house. There is no reason, with careful consideration, why local planning authorities (“LPAs”) couldn’t utilise a ‘paperless office’ model and I am aware that some LPAs have already made inroads towards such a move. The costs involved are likely to involve slightly increased amounts of time by Officers in preparing two reports, although it should be noted that the same work would need to be carried out under the proposed system in any event.

Noting that the vast majority of applications are submitted electronically, the principal costs of preparing two files is borne by the local planning authority. If one makes a (liberal) assumption that the extra cost of administering two files over one is £100 per file, this would equate to an additional cost of £21,100 per annum (over all ten authorities) although I suspect this figure is, in fact, significantly lower. Indeed there is scope for internal management protocol to be changed so that only one paper file is prepared for dual applications reducing cost within the existing legislative regime.

The additional cost that remains is the administrative time of setting up each application in the LPAs electronic planning database and administering the post decision process. When considering the cost across the entirety of the authorities it may be worth reminding ourselves “de minimis non curat lex”.

In formulating this response I have asked myself the fundamental question - What is the problem the proposed changes will provide a solution for? In trying to establish the problem I have attempted to look at the situation prior to the 1990 Acts. I am reminded of a quote from a book published some time ago relating to the law surrounding historic assets. I repeat it below: “It is not enough merely to schedule monuments, to list buildings and to designate areas. There must be a control mechanism to back this up with special protective measures, with the force of the law. To some extent this can be achieved through the normal mechanisms of planning control. When planning permission is sought for a proposal involving the loss or alteration of a historic building, the local planning authority should be able to use its development control powers to ensure that unsuitable proposals are not allowed. However this has in the past proved inadequate. This is possibly because there have been insufficient planners with appropriate skills and knowledge. It is also because the legislation provides that planning permission is not required for demolition.”

The Planning (Listed Buildings and Conservation Areas) Act 1990 largely solved the demolition issue, certainly until the Shimizu case which has had a significant impact on the preservation of conservation areas. The demolition question is quite clearly complex and is undoubtedly an area that should be looked at. The merger of CAC with planning permission in England is noted. The success of this in effectively reversing the Shimizu decision is possibly unintended and relates, I understand, to the definition of ‘building’ in the Town and Country Planning (General Permitted Development) Order 1995 (“the GPDO”). People more versed than me in the law have attempted to clarify the complexities of the definition of demolition in the GPDO and I will not repeat those efforts here but I firmly believe there is scope to improve

the protection offered to unlisted buildings through an improvement to the existing legislation in this area. This is an area sadly missed in the recent Historic Environment (Wales) Act.

Perhaps, then, it is the case that there are now sufficient planners (in public and private sectors) with appropriate skills and knowledge to deal with works to listed buildings and conservation areas. Research by the Institute for Historic Building Conservation ("IHBC") would suggest otherwise. In their most recent report on Local Authority Staff Resources they find that "Since 2006: the number of conservation specialists has fallen by 37% (299.1FTE);…". Whilst it is accepted that this research relates to England, it is an indicator of a wider decline in specialist knowledge. Within Wales, I am aware that in 2006 the Vale of Glamorgan hat 3 FTE conservation specialists; currently they have 1 FTE.

Alongside this, the scope of considerations taken into account in the determination of planning applications has increased significantly over the last decade with increased focus on sustainability, health impact assessments, ecology and viability all providing challenges to planning officers who cannot, reasonably, be expected to be subject matter experts in such a wide variety of material considerations. Individual planners reliance on others is as critical today as it has ever been. This is reflected in the wider Welsh Government ambitions to see increased collaboration between local authorities.

You will note that many of the issues identified above stem from secondary legislation or policy issues. Fundamentally, I am of the view that the primary legislation - whilst messy from a series of amendments – is not the most significant problem that needs to be resolved in the future management of historic assets in Wales.

The proposed solution solves a problem of 'unnecesary complexity or inconvenience' by replacing it with a different complexity in terms of defining heritage development that excludes a significant amount of heritage.

13.102 *Dr Simon Bradley:* I write as a lover of Wales and its historic buildings to express extreme concern at the proposed changes to planning law that risk diluting the special status of listed building consent. By merging such consent with the ordinary planning process, as proposed, the special protection which listed status conveys would undoubtedly be weakened. The result would be erosion, loss, and the long-term decline of the Welsh historic environment as a resource both for the people of Wales and for visitors. There are good reasons why England and Scotland have not taken this step. Please do not allow Wales to become the dismal exception.

13.103 *Ruth Richardson:* I object very strongly to the idea of the 'consolidation' of listed building consent with planning consent. The listed buildings of Wales are its heritage, and they should not be lumped in together with the consideration of proposed new buildings, as though they are just an encumbrance. The separate consideration of the value of heritage buildings should remain steadfastly kept, as their protection is of inestimable importance. I sense from the way the document is drafted (two of everything! repeated to seem deliberately tedious) that there is some serious level of impatience with the need to consider the importance of heritage buildings by whoever wrote the document. Those who consider this document should bear this in mind when considering whether to adopt its suggestions. This suggestion is really

shameful, is it seeks to erase the serious consideration of the value of heirloom buildings and sites in Wales. If this separate consideration were to be lost from the process of planning decision-making - there will be a heritage holocaust in Wales.

Moreover, such a decision in Wales will provide a terrible precedent for the rest of the UK. I urge those considering this biassed document to reject this suggestion in its entirety. Wales is a nation proud of its heritage, in its built heritage no less than in its language and culture.

Please do not allow money-grubbing developers & builders and planners to have an entirely free hand in the destruction of a proud nation's built heritage. Every listed building has been listed for good reasons, and these could EASILY be lost sight of if planners were to have only one process of decision-making. The principle that listed buildings should be valued for their own intrinsic importance should not be lost sight of, and this is the most serious risk involved in this dangerous suggestion. Please reject his idea forcefully.

Other respondents

13.104 *Redrow Homes:* Redrow believe that the changes proposed here, again UK wide understood procedures, and not necessary and would just be a costly change to implement for no compelling reasons. For example, proposing that internal changes to a listed building or simply painting a listed building in Wales would require planning permission, as opposed to just listed building consent as at the moment, does not appear sensible and would likely create more confusion in this instance.

13.105 *Monmouth Diocesan Advisory Committee for the Care of Churches:* Listed Building Consent was formerly incorporated within Planning Permission, in the 1970s. It was the recognition of the unsuitability of that system that led to the independence of Listed Building Consent and the subsequent strengthening of the legislation. These new proposals represent a huge retrograde step and a real threat to the built heritage of Wales, both ecclesiastical and secular. This is an ill-conceived and ill-considered plan: the likely impact on Ecclesiastical Exemption is one obvious example of this.

[P]

Listed Building Consent covers a range of issues that Planning Permission was never intended to cover. It has also traditionally been without fee. The current legal system for the protection of the Historic Environment is sound. Problems arise, instead, from the way it is sometimes implemented. This being the case, the merging of the two systems is unlikely to improve the outcome for this historic environment of Wales, or the way it is protected at a local level. Indeed, it is likely to lead to an erosion of specialist conservation advice both on DACs and within Local Authorities.

The members of this committee sincerely hope that the Welsh Government will see past the rhetoric of simplification and ensure that the level of protection afforded to our built heritage remains unchanged by this short-sighted proposal.

13.106 *Country Land and Business Association:* We (in summary) do support merging conservation area consent (CAC) and planning permission, but we do not support

merging listed building consent (LBC) with planning permission. Our reasoning is as follows:

We do not feel that listed building consent (LBC) should be merged into the planning process:

1. As with CAC, in principle this would appear a worthwhile simplification. But again merger would not be transformational: it would not greatly reduce the workload either for the applicant or the local authority, because where there are two applications they are usually identical and handled identically by the local authority. The potential benefit is therefore limited. (A greater benefit could be achieved by process improvement rather than primary legislation: a front-end tool like 1APP already generates a LBC and/or planning application as required, and the use of better IT processes in the rest of the planning process could handle two applications more efficiently. Although the headline need for two consents would remain, the practical disadvantages would be small).

2. There is significant concern in the heritage sector that a merger, by abolishing the separate consent and making the special interest of listed buildings simply one of many planning considerations which might be material, would dilute the protection of listed buildings. We have some sympathy with that view.

3. It is clear that merger would face substantial opposition from parts of the heritage sector, and Welsh Government would have to expend significant resource and political capital overcoming this.

4. Of course that is not by itself a good reason not to take this forward: if there were substantial benefits from the proposal which outweighed any disadvantages, Welsh Government should obviously proceed with it. But (see point 1 above) we are not convinced that that is so.

5. Our principal practical objection to this proposal is that it would ‘freeze’ the LBC system, preventing any other reform for a decade or more. Merger of LBC and planning permission would not be politically plausible without a firm guarantee that there would be ‘no dilution of heritage protection’ (as suggested in 13.10, and guaranteed in 6.61 in the Scoping Paper). Any proposal to change any aspect of the LBC system would then be interpreted as a breach of that guarantee. This would prevent not only actual change, but even the discussion of possible change, for a decade or more.

6. This matters, because the LBC system needs significant change. Local authorities do not, and will not, have the resource required to provide detailed expert scrutiny of every change to every listed building, as the current system requires. This resource gap makes it (i) too easy for malign owners to damage the special interest of listed buildings because lack of resource makes enforcement unlikely; and (ii) too difficult to get consent for sympathetic change of the kind needed to ensure that listed buildings are updated and will be valued and maintained. This much reduces listed building protection. There are potential solutions, in which scarce resource can be freed up for higher-impact proposals and enforcement, by identifying low-impact proposals and handling them in streamlined ways: see in particular the heritage-sector-led proposals at http://www.theheritagealliance.org.uk/historic-environment-

forum (Summer consultation paper). Those solutions may or may not be right for Wales, but the key point is that it would be impossible even to begin a discussion if as above there were a pre-existing guarantee that nothing in the LBC system could be changed.

7. Finally, if the merger proposal were to be enacted, it is important that an applicant could, in practice as well as in theory, seek and obtain consent only for one element of a more complex proposal, as suggested in 13.107.

Disagreement on the basis of prematurity

13.107 *Pembrokeshire Coast NPA & National Parks Wales:* With the 2016 Historic Environment (Wales) Act, TAN 24, the revised Chapter 6 of PP Wales and the suite of policy documents, Wales has a comprehensive system of protection of the historic environment. After extensive consultation across the planning and heritage sectors, the draft legislation and guidance received a positive response and those 'on the ground' are now getting to grips with the new regime, despite decreasing resources. What is now proposed removes in one sweep a system of consent dedicated to protecting the unique and finite resource of the built heritage of Wales, a system much refined and revised within the last two years. We are of the view that such a proposal is premature and review of the legislation should at the very least be delayed until the effectiveness of the new legislation and guidance becomes apparent.

The current regime allows listed building proposals to be considered within the context of the defined conservation principles and heritage values. What is proposed is effectively a broadening of the philosophical emphasis on 'conserve as found' and is seen as more relevant in the context of sustainable development, which is the essential thrust of PG Wales.

In short, we feel that the existing regime is fit for purpose and in tune with the requirements within 21st century Wales whereby the importance of built heritage is underpinned by its own consent regime, yet as revised, the legislation and guidance provides transparency for the input of heritage professionals. Cadw has devoted much of its time and (increasingly limited) resources over the last 2-3 years to drafting and consulting on the new legislation and guidance. The whole sector – from applicants and agents to officers – now requires a period of consolidation, as well as the urgent need to review capacity across Wales to improve its service to the public (see below).

We note in paragraph 13.61 the reference to the Penfold Review of 2009, which concluded that unification of non-planning consents was 'too complex a change to make at a time when resources were severely constrained'. Since 2009, resources are even more stretched in Wales. The Review resulted in the unification of planning and conservation area consent in England, which we would support in Wales (see below)

13.108 *Planning Officers' Society Wales:* With the 2016 Historic Environment (Wales) Act, TAN 24, the revised Chapter 6 of PP Wales and the suite of policy documents, Wales has a comprehensive system of protection of the historic environment. Those 'on the ground' are now getting to grips with the new regime, despite decreasing resources.

Collectively, POSW is of the view that such a proposal to combine listed building consent and planning permission is premature and review of the legislation should at the very least be delayed until the effectiveness of the new legislation and guidance becomes apparent.

Wales Heritage Group: Premature review

The full implications of the Historic Environment (Wales) Act 2016 have yet to be assessed, indeed it has yet to be fully implemented. It would be premature to further revise legislation until the effectiveness, or not, of the existing new regime has been properly analysed following a suitable period of implementation in practice.

The Group notes that, in England, Conservation Area Consent was merged with planning permission in 2013 and that the Planning Act 2008, introduced a new system of "development consent" for major infrastructure projects, which avoided the need for separate 'heritage' consents. However, there have been no studies of the implications of these changes and we would consider it prudent to review how the changes have maintained the protection of the historic environment and / or achieved any or all of the aims set out above in England before considering extending this change or implementing a similar system in Wales.

13.109 *Monmouth Diocesan Advisory Committee for the Care of Churches:* Furthermore, timing of this review is extraordinarily badly managed, coming so soon after the passing of a new Planning Act and a new Historic Environment Act for Wales. The current Welsh legislation for the protection of the historic environment is recognised as exemplary within a national (UK) context. The Welsh Government should build on this success, not diminish what has recently been achieved.

13.110 *Andrew Goodyear:* As to timing, Wales has only recently seen the system change after the Historic Environment (Wales) Act 2016 – indeed I understand that it is not yet fully implemented, let alone there being a chance to have assessed its impact. Another change in the regime at this time will only serve to confuse a public still getting used to a new system and cannot be evidence based as there is none as of yet. The proposals do not meet the stated objective of making the system more accessible.

Disagreement on the basis of possible loss of specialist expertise

13.111 *Dyfed Archaeological Trust:* If consents were to be merged there is a danger that local authorities would use planning officers to undertake all aspects of the consent process and thus could justify losing specialist building conservation staff. Expert specialist opinion is, to some extent, what defines a listed building and how proposed works could potentially affect it. A lack of specialist skills could lead to decisions being made that do not to take full account of heritage legislation, conservation guidance and current best practice, particularly as decisions have to be made within a pressurised eight-week period.

13.112 *Pembrokeshire Coast NPA & National Parks Wales:*

3. Capacity issues

Paragraph 13.7 states that merging separate consent regimes should result in efficiency savings. This poses the clear risk that planning authorities could use the merger of the two systems to justify the loss of specialist staff – i.e. the building conservation officer. Paragraph 13.125 suggests this this should be resisted either via guidance from the Welsh Government or through pressure from professional bodies. There is a worrying lack of substance within this suggestion. What locus, for example, does the Welsh Government have over the staffing provisions of a planning authority? In this context, how effective is the lobbying of bodies such as the IHBC?

This Authority has formed part of a ministerial Task and Finish Group to review the provision of heritage services across Wales within planning authorities and make recommendations for sharing services and expertise. Progress has been very slow – hampered by combination of low capacity, resources and logistics, despite the fact that relevant officers are positive to the principle of sharing services across local authority boundaries. The biggest hindrance is the lack of lead from government level even on issues within their locus, such as making the listed building consent delegation scheme more flexible.

Planning Officers tend not to be well-versed in heritage legislation and guidance (just as conservation officers tend not to be well-versed in planning legislation). A RTPI survey (The Planner 8th December 2017) undertaken in the summer of 2017 revealed that out of 4225 respondents, only 15% had been involved with heritage and conservation during the previous three years. In terms of practicalities, it is difficult to envisage a single officer – whether a planner or heritage professional – successfully determining an application for 'heritage development' in all but the simplest of cases. This of course is in the face of the required eight-week turnaround, and economic/political pressures.

13.113 *Allan Archer:* I also share the anxieties about the effect on specialist resources given the present pressures on local authority budgets, which do not show any sign of easing any time soon.

13.114 *Gwynedd Archaeological Trust:* We are concerned that, by merging listed building consent, conservation area consent and planning consent, the special qualities of listed buildings and conservation areas will be lost. Any merger would need to ensure that the full qualities, including setting and curtilage, of listed buildings be recognised at the outset, and the consent considered within these parameters. This requires a level of expertise not usually expected of planning officers, and therefore they would need to be advised by building conservation staff qualified to advise on these issues. It is therefore essential that future changes to the process ensure the provision of this advice will be given by appropriately qualified persons in cases involving listed buildings and conservation areas.

13.115 *Society for the Protection of Ancient Buildings:* Importantly, the current requirement for listed building consent indicates to owners and decisionmakers that the asset they are dealing with is so valuable, sensitive and irreplaceable as to need an additional consent, overseen by a specialist officer. Any perceived diminution of the value of listed buildings, their status within the planning system and the regime that controls them can only aggravate the already alarming cuts to historic environment expertise in local authorities. The review makes it clear that it would be the role of guidance to

ensure that beleaguered and resource-starved authorities do not cut or by-pass conservation officers but we wholly disagree with this assertion. It is the responsibility of the review not to introduce reforms that would diminish the existing levels of protection, and whilst it might be convenient to state that that responsibility stops at writing robust legislation, changes to legislation should not be made in a vacuum. It is well documented that the heritage expertise in local authorities is declining and it is simply obvious to those working in the sector that in the current environment, this reform would inevitably lead to cuts to specialist staff who are currently protected by being experts in heritage and a separate consent regime. Additionally we note that such guidance on the need for specialist advice exists throughout the United Kingdom and is yet to have prevented the loss of local authority and other historic environment services. Similarly professional bodies are already campaigning against the loss of specialist staff as suggested in 13.125, it hasn't prevented that loss, and so we would suggest that this would be no mitigation against the unintended but highly likely consequence of the reform.

(Issues not covered by consultation questions) Applications: Whilst the matter of application submission documents is discussed in 13.149-13.150 there is no accompanying consultation question. We would like to state that, should the reforms be implemented, we believe that not adding into the regulations the base-level information required for heritage applications, in-line with the proposals for planning permission submission documents under 8.1, would be a missed opportunity.

13.116 *Planning Officers' Society Wales:* A RTPI survey (The Planner 8th December 2017) undertaken in the summer of 2017 revealed that out of 4225 respondents, only 15% had been involved with heritage and conservation during the previous three years. In terms of practicalities, it is difficult to envisage a single officer – whether a planner or heritage professional – successfully determining an application for 'heritage development' in all but the simplest of cases.

13.117 *South Wales Conservation Group:* In the opinion of the group this dual application approach would be very unlikely to result in the existing level of protection for historic assets being maintained. Concern was expressed over the expertise that is in place across Wales to be able to deal with these applications as dual applications within planning departments. It is noted that there is currently no Listed Building Consent training in place for Development Management Planning Officers.

13.118 *Lydia Inglis:* Like SAVE, I believe that this proposal will threaten the future of listed buildings in Wales by reducing the need for a skilled conservation officer to examine and vet proposals. Conservation officers are trained to understand the special nature of the listed building, and assess how proposed changes will affect its significance. How will a planning officer deal with such an application? While they are also very skilled, they do not possess specialist knowledge of Welsh historic buildings. There is BOUND to be loss of historic fabric as a result of this proposed change. Listed buildings form only tiny proportion of the building stock in Wales, but they are a precious resource cherished by many, and tell us so much about our history and culture. To effectively remove their special status within the legislative framework would ultimately damage Wales's heritage, and, by association, its tourism industry in the long term. I wholeheartedly agree with SAVE's statement:

13.119 *Chartered Institute for Archaeologists:* Furthermore, any perceived diminution in the value of listed buildings and of the processes designed to preserve and enhance them can only aggravate the problem of diminishing resources applied to local authority historic environment services. This may to some extent be a matter of political will (see paragraphs 13.126-126 of the review), but authorities are under intense financial pressure and anything which might be seen as an invitation to by-pass conservation officers and other heritage professionals may provide a temptation too hard to resist for beleaguered politicians. Nor are such risks likely to be avoided by the use of guidance. Such guidance has sought to protect the historic environment throughout the United Kingdom, but it does not have the force of statute and has not prevented the loss of local authority and other historic environment services. As a professional body, CIfA (in partnership with CBA, IHBC and others in the sector) has lobbied hard for the maintenance of local authority historic environment services and the expert input that they provide throughout the UK, but this has not always been enough to ensure that there is appropriate expert advice to planning authorities in all cases.

13.120 *National Trust:* The conservation of the historic environment requires a legislative system that gives sufficient protection and is underpinned by expertise and consistency. The current system gives primacy to listed buildings with significant weight given to the consideration of small changes which may have negative impacts on any given heritage asset or its setting. Listed buildings can reveal several layers of historic development. It is these layers that require a measured approach to evaluate the relevant levels of significance (significance being the value of a heritage asset to this and future generations because of its historic interest). When considering change, or development, it is the impact on significance that must be carefully considered as this change may lead to harm.

This approach works when suitably qualified people can engage in the detail of any proposed change and balance the impact against the significance of a heritage asset. In order to make these delicate judgements it is important that those considering changes to a listed building have the relevant professional training and expertise. It is not true to say that listed building status prevents development but enables good development, while retaining historical significance, those individuals making an assessment need to have a thorough understanding of architectural heritage. When a building is nominated for listing we would expect a recommendation be made to the Welsh Assembly by the professional Inspectorate of Historic Buildings within CADW. We rely on this professional input when assessing a building for listing and would question why a different process would be suitable when considering change.

Due to budget cuts across local authorities this expertise has dwindled over the last decade and there is a danger this will be further eroded. Should LBC be removed it will be tempting for budget holders at local authorities to do away with an expert in favour of an alternative staff member with responsibility for ‘heritage’. Whatever that individual’s interest and passion it is unlikely that they will have the relevant knowledge and expertise to deal with the complex discussions when considering LBC. Further reduction in expertise in the historic environment will, by definition, lead to further threats to irrevocable loss in the historic environment of Wales. There has to be an inherent concern that further expertise may be lost and, therefore, poor decisions made in respect of the historic environment. It is important, therefore, that

those balancing development need against historic significance have all the tools and knowledge to make an informed assessment. The suggestion that harmonising the legislation under one consent regime could appear particularly attractive but should not lead to the demotion of conservation interests.

13.121 *RESCUE, British Archaeological Trust:* We are also concerned that whilst Listed Building Consent is treated differently it is currently clear that decisions need to be made by a suitable qualified historic environment professional. We see the inevitable, if unintended, result of this if introduced, will be to reduce the perceived importance of Conservation Officers and the requirement for Listed Building decisions to be made with specialist advice.

We would like to see this element removed from the proposals unless specific wording can be introduced to protect the role of suitably qualified individuals within in the planning system.

13.122 *Institute of Historic Building Conservation (IHBC):* The Institute's concern at that time of the Scoping Paper consultation was that the consequence of the proposed unification of the consents will be a loss of quality decision making in terms of the importance attached to such applications. This could lead to potential failure of decision-makers to obtain advice from appropriate conservation experts, leading to more erosion of heritage protection. The concern remains that if this proposal is accepted it could result in a reduction of specialist knowledge required. Thus, the submergence of heritage and heritage consents into a wider definition/decision-making regime could dilute the role and impact of specialist advisors in the planning process. This is turn could lead to a reduction in capacity of specialist advice leaving the historic environment without those to manage it with appropriate knowledge and understanding.

13.123 *Aberystwyth & District Civic Society:* Secondly, the importance of the special status of Wales's 30,000 listed buildings is recognised by the employment of dedicated conservation officers by each planning authority. Conservation officers are planning officers with responsibility for listed buildings and conservation areas. Their special skills in conservation and their advice have preserved the character of many thousands of historic buildings. The loss of the special status of listed buildings within the planning regime will inevitably lead to the loss of the specialist staff who have responsibility for listed buildings.

13.124 *Manchester Civic Society:* Within these last fifteen years the status of conservation officers has been greatly diminished, to the point at which many authorities now do not have a single conservation officer. Budget cuts have also depleted on the numbers and status of planning officers. Yet in the absence of a conservation officer, it is the planning officer's task to compile an account of the issues which threaten the fabric or setting of a listed building, for the information of those councillors on the planning committee who decide on planning applications.

13.125 *Monmouthshire CC:* Capacity and Resources. Concerns are also raised about the potential loss of specialist staff within LPA's. Local Authorities are already under resourced, very few Planning Authority's actually convers their costs in fee income. This risk is also recognised by the commission in paragraph 13.125/6. Whilst there is a recognition that this should not happen, there is no guarantee that it won't. At

present some authorities that do not have specialist expertise available to them and the proposed reform would not encourage them to do so. There have been a number of reports in recent years that have highlighted the decline in the numbers of specialist officers which shows no sign of improvement. It is not considered that the Welsh Government or other relevant bodies are in a position to apply pressure or insist on retention or even enhancement of staffing levels in LPA's, therefore again it is considered that the risk far outweighs the perceived benefits.

13.126 *RTPI:* We also have concerns regarding the impact of unifying consents on specialist resources, given the present pressures on local authority budgets. The consultation paper recognises the risks in terms of the further loss of specialist staff and their expertise. It says "This would have to be resisted, possibly by appropriate guidance from the Welsh Government or through pressure from relevant professional bodies." This does not prove a convincing argument for unification, given that the guidance and pressures which are already in place have not prevented the loss of some existing skills and expertise. The loss of skills in planning is a very real issue. The 2017 RTPI survey revealed that out of 4225 respondents, only 15% had been involved with heritage and conservation during the previous three years. http://www.rtpi.org.uk/membership/membership-survey/

13.127 *Wales Heritage Group:* It is widely acknowledged by those with lengthy practical experience and knowledge of the heritage sector that an unintended consequence of the proposed review and merging of consents would be the likely further loss of expertise and specialist heritage staff within local planning authorities. Research by the IHBC in 2012 (*Quantifying Local Planning Authority Conservation and Archaeology Staffing in Wales)* showed reductions in staffing levels for conservation and archaeological staff in Wales. Recent evidence presented by the Welsh Local Government Association (WLGA) has confirmed what is widely known 'on the ground' - that this trend has continued.

Without such expertise within local planning authorities there would be a serious risk that consideration for preserving the historic environment is unintentionally not given the 'considerable weight' or 'special regard' that is required in decision making, simply through lack of specialist knowledge and experience. This would lead to a side-lining of heritage concerns, a reduction in the quality of decision making and would not fulfil the legal requirements for the protection of our heritage assets nor the objective of this review. Without adequately resourced local authority heritage services it will not be possible to properly implement the Historic Environment (Wales) Act 2016.

Public bodies in Wales have been struggling for a considerable time with this reduction in specialist staff and several attempts have been made to find alternative systems or measures which would address this issue (e.g. The Simpson Review (2011), The Hyder Report (2013), also see the evidence from Welsh Local Government Association to the Culture, Welsh Language and Communications Committee for the inquiry into Wales's historic environment, amongst many others). That these attempts have been made is an acknowledgement that specialist expertise is required at local authority level.

13.128 *Ancient Monuments Society:* Local authority expertise: we are extremely concerned that the proposed changes would further erode the standing of conservation expertise

within local authorities. The number of conservation officers employed has already diminished dramatically in recent years, and the abolition of Listed Building Consent would only exacerbate the problem. The lack of specialist advice at a local level will only serve to weaken heritage protection and will cause delays in the decision-making process. There is also the risk that poor or incorrect advice will be provided to building owners by non-specialists, leading to harm to historic buildings and possible litigation.

13.129 *Royal Commission:* We are also concerned about the potential loss of local authority conservation and archaeology specialists if listed building consent applications are decided by planners and elected members of a planning committee with little or no understanding of building conservation policy and statute. The current trend of reducing specialist staff and making savings through staff reduction makes this a very real possibility. The experience of people who work in this field suggests that the very few elected planning authority members understand their duties with regard to conservation law and policy, and we are all too familiar with planning decisions that are routinely made on the basis of personal opinion rather than evidence, understanding and advice. Again, we fear the side-lining of hard-won heritage protection measures and decisions being made that would not comply with the legal requirements for the protection of our heritage assets

13.130 *Council for British Archaeology Wales:* Impact on local authority expertise: If these proposals were enacted, we are concerned that there would be further loss of local authority conservation and archaeology specialists as conservation is side-lined and applications decided by planners with little or no experience or expertise in building conservation. The current trend of reducing specialist staff and making savings through staff reduction makes this a very real possibility.

The consultation notes this concern but suggests it should be a matter for guidance and influence from professional bodies. There are provisions for both of these currently in place but in practice these provisions make little difference when local authorities are faced with making considerable savings due to vastly reduced incomes.

Please note the requirement of Planning Policy Wales for listed building decisions to be taken at a local level (TAN 24, 5.20) and the use of “specialist knowledge and skill” required to “sustain the special interest and significance of a listed building through the process of alteration, extension or re-use” (TAN 24, 5.14).

There would therefore be a serious risk that consideration for preserving the historic environment is not given the ‘considerable weight’ or ‘special regard’ that is required in decision making, simply through lack of specialist knowledge and expertise. This would lead to a side-lining of heritage concerns, a reduction in the quality of decision making and would not fulfil the legal requirements for the protection of our heritage assets.

13.131 *[REDACTED]:* I note that you state under 13.7 that the current levels of protection would be maintained, however, it is our experience that the workload of Conservation Officers under the current system is already unsustainable, due to existing ‘efficiency’ measures. If the separation between planning and conservation is removed what incentive is there for local authorities, exposed to year on year cuts, to maintain specialist Conservation Officers?

The further loss of the irreplaceable skills that Conservation Officers bring to decision making in the historic environment would be catastrophic to the fabric of this nation. There are numerous studies into the economic benefit that the Historic Environment brings through Heritage Tourism, especially up here in North Wales. This benefit can only be realised if the wider environment is maintained and protected. Conwy Castle is nothing without its surrounding town and protected stetting.

We have already seen the shocking diminution of Conservation Areas in areas such as Abergele and Dolgellau as there are simply not the resources in place to safeguard the benefit that an attractive and coherent historic environment brings.

Disagreement on the basis of concerns relating to fees

13.132 *Dyfed Archaeological Trust:* Planning consent currently attracts a fee payable by the applicant. No fees are attached to listed building consent. There is a danger that that by merging consents, and so presumably attaching a fee to the merged planning/listed building consent process, that some owners may not in the future apply for consent for minor works to a listed building – works that currently only require listed building consent and not planning consent. This would be detrimental to the built heritage. One solution would be to waive fees if the building in question is listed. This would have multiple benefits: highlighting the special quality of listed buildings, encourage owners to apply for listed building/planning consent even for minor works; and putting a financial benefit on owning a listed building. The latter is particularly important as owning a listed building in Wales is often viewed as a burden. We recognise that this solution could result in the loss of income to local authorities and thus is something that may not be acceptable to them, particularly in the current financial climate.

13.133 *Gwynedd Archaeological Trust:* At present, if works require listed building consent but not planning consent, no fee is payable. If a fee is requested, it may lead to minor works being undertaken without consent. This would be difficult to monitor, and would certainly be detrimental to listed buildings. One solution might be to remove any planning fees associated with listed building consents, which would encourage owners to seek advice and consent in advance of works.

13.134 *Canal & River Trust:* We are however particularly concerned that a unified consent regime could result in fees being charged for works to listed buildings and in conservation areas, that previously didn't attract a fee. In Wales, the Trust owns 223 listed buildings. We have calculated that if listed building consent were to be required 2 or 3 times over the lifetime of one of our listed assets, and this, for example, attracted a fee similar to that of a current householder planning application (£190), this would cost the Trust an additional £85,460 or £128,190. The introduction of such fees would divert income away from our charitable activities which, given the multi-purpose nature of the waterways, have an important role to play in helping to achieve all 7 of the well-being goals set out in the Well-being of Future Generations (Wales) Act 2015. Whatever the regime adopted for the consideration of works currently covered by listed buildings and conservation area consent it is imperative that our estate has a permanent exemption from application fees for work to our heritage structures, to avoid what we suspect would be the unintended consequence illustrated above.

13.135 *Dr Martin Cherry:* Following from the last point, I also found that owners appreciated the fact that there was no charge for applying for LBC. No fee is a way of recognising that, for instance, insisting that wooden sashes should be reinstated (rather than allowing UPVC windows) did not normally benefit the owner financially.

13.136 *National Trust:* It should be noted that currently planning applications attract a fee on application while listed building consent is without charge. Applications for works to a listed building should continue to remain free of charge. A planning application may be the single application the owner of a non-listed property may make whereas the owner of a listed building may be required to make a number of listed building consent applications to cover any changes to the exterior and interior structure as well as to fittings. Owners of a listed building act as guardians for their property and it is beholden on them to maintain the historical significance of the building. As the current LBC is free owners engage with the system. Applying a charge for any reasonable changes would be an unfair levy on those owners and may lead to a rise in unauthorised works.

13.137 *Institute of Historic Building Conservation (IHBC):* We are also concerned about the implications to the fee structure. Applicants who presently require Listed Building Consent but not planning permission could lose their fee exemption. This could be an introduction of fees on Listed Building Consent, which is a major issue requiring very detailed debate, without the appropriate discussion.

13.138 *Torfaen County Borough Council:* It should be noted that the requirement to refund an application fee that is determined out of time should not apply to applications relating to listed buildings as these need to be agreed by Cadw which could lead to delays. We would not wish for any delays to result in application fees being refunded.

13.139 *Institute of Historic Building Conservation (Wales):* Fees: The assimilation of LBC into PP would mean that a planning fee would be required for a process which is currently free. There is a long-standing argument that to introduce a charge for non-developmental works to a listed building would increase the likelihood of unauthorised works taking place. Lost historic features cannot simply be reinstated. As Planning Policy Wales states, “unauthorised work may often destroy historic fabric, the special interest of which cannot be regained by enforcement” (TAN 24, B.9).

13.140 *RTPI:* Unification of listed building and planning consents would result in an application fee for works to a listed building where there is currently no fee. There is a risk that some owners will avoid applying for consent due to a fee. Detecting internal works would be difficult and once these historic elements are destroyed/altered, it is very difficult if not impossible to replace them.

13.141 *Cardiff Council*: Fees: The change would likely introduce new fee ambiguities, where elements requiring planning permission under existing regime would need to be separated from those only currently requiring LBC.

We are aware that proposals to remove LBC fee exemptions have been long-debated and generally opposed by heritage organisations, primarily on the grounds that to introduce a fee could lead to an increased burden on, and possibly resentment from, owners, with an associated increase in unauthorised works also envisaged. This view is shared by this authority, particularly given the pressures on enforcement officer

resources that are faced by all local authorities. Even if the powers and criminal proceedings remain, for a variety of reasons the reality is that prosecutions are rare.

13.142 *Theatres Trust:* Furthermore, it is assumed that the merger of listed building consent into a single planning permission would result in a fee becoming payable whereas presently there is no fee. This could result in an increase in unauthorised works taking place to listed buildings.

13.143 *Society for the Protection of Ancient Buildings:* Fees: Whilst the matter of fees is discussed in 13.155-13.158 there is no accompanying consultation question on the specific matter of heritage applications and the fees to be levied against them.

We would like to state our strong opposition to any reform which would introduce a fee for heritage applications. Presently, applications for listed building consent are not subject to a fee on the basis that most listed building consent applications are not made for commercial gain, and because the state imposes greater expectations on owners of listed buildings because of their public value. In a similar vein applicants seeking planning permission where the need for permission arises out of the imposition of an Article 4 Direction on a conservation area do not have to pay a fee for that permission.

There is a long standing argument that to introduce a charge for non-developmental works to a listed building would increase the likelihood of unauthorised works taking place. Lost historic features cannot simply be reinstated through taking enforcement action: once they are gone they are gone. The same follows for planning permissions sought due to the imposition of Article 4 Directions.

13.144 *Council for British Archaeology Wales:* Fees: The assimilation of LBC into PP would mean that a planning fee would be required for a process which is currently free. There is a long standing argument that to introduce a charge for non-developmental works to a listed building would increase the likelihood of unauthorised works taking place. Lost historic features cannot simply be reinstated. As Planning Policy Wales states, “unauthorised work may often destroy historic fabric, the special interest of which cannot be regained by enforcement” (TAN 24, B.9).

13.145 *Caroline James:* Listed building owners have increased costs at planning stage e.g. vast majority need an ecology survey, condition survey as well as heritage impact assessment. The ‘no fee’ listed building consent application fee therefore helps a little to address this imbalance.

13.146 *Andrew Goodyear:* A merger would either introduce fees for listed building consent (which would encourage unapproved work which once done cannot be undone) or introduce a non-chargeable element into planning – hardly a recipe for making things clearer or reducing bureaucracy.

13.147 *Ancient Monuments Society:* 8. Fees: Planning Permissions presently attract fees whereas Listed Building Consent does not. This is mainly on two grounds:

a) that the applicant shouldn’t be expected to pay on what can be a commercially unproductive change rather than development; and

b) where Listed Building Consent and Planning Permission are required an applicant shouldn't have to pay twice for what can be the same proposal. Under the proposed system, owners of listed buildings would be charged when they applied for Planning Permission for small-scale proposals which, more often than not, are in that first category – change that that is for convenience rather than overt commercial gain.

In addition to this, some owners regard the fact that Listed Building Consents are free as a recognition by the State to the individuals who look after the nation's heritage in the days when grant aid for privately owned listed buildings (two thirds of the total) is virtually non-existent.

13.148 *Monmouthshire County Council:* Fees: It is noted that fees are recognised as part of the review which is welcomed. It is noted that if the consent regimes are merged this would provide an opportunity to consider whether heritage developments should be exempt. However, it is felt that this is an opportunity to review this situation, regardless of the proposals set out in Chapter 13. Work is being carried out in North Wales looking at cost recovery of lbc applications which should be taken into consideration. The cost to authorities is not insignificant and therefore in light of limited resources due consideration should be given to the opportunity to look an element of cost recovery, however small.

Disagreement on basis of concerns as to role of Cadw

13.149 *Pembrokeshire Coast NPA & National Parks Wales:* Of concern is the role of Cadw in the consultation process. This currently varies across Wales whereby 5 planning authorities have been given listed building delegated powers (allowing decisions for certain types of applications for listed building consent to be made 'in-house') and some in contrast have no dedicated officer. Others, such as Powys have a single officer covering a vast area, a typical scenario for the larger rural authorities. It is likely that if heritage officers (on whom the delegation is directly conferred) will seek to cease the delegation scheme should they feel that a single consent regime will underplay conservation interests with consequent impacts on the historic environment. This is in contrast to Cadw's wish to see delegation rolled out across Wales with the potential for authorities sharing services with fellow delegated officers, and training up others. In effect, a single consent regime would require the need to refer all applications for 'heritage development' to Cadw with the consequent strain on their resources and inevitable delays for the applicant.

We are unclear as to whether applications for 'heritage development' would be subject to the 'call-in' provisions that listed building applications are currently subject to. Cadw rarely exercise these powers, but their ability to do so is a good safeguard for interested parties. Given the role of Cadw within the Welsh Government, calling-in applications where there is a significant element of sustainable development is regarded as politically unlikely, thereby putting the heritage aspect on the back foot.

13.150 *South Wales Conservation Group:* How will the proposal for dual applications be dealt with in the context of Cadw's role? There are inconsistencies across Wales in this context. Whilst delegation of listed building consent has been awarded to 5 planning authorities (for certain works to Listed Buildings to be approved without Cadw's involvement) in other areas there are no dedicated officers, or the area is vast and

covered by one member of staff. Cadw's ongoing approach is to roll out delegation across Wales and encourage shared use of delegated officers.

The implications of a shared consent regime would seem to be that all 'Heritage Development' applications would need to be referred to Cadw with the ensuing resource implications for them, and inevitable delays for the applicants. Where would this leave delegation?

13.151 *Monmouthshire CC:* Delegation/Cadw sign off. Another added complication will become apparent when addressing issues of delegation. At present only 5 Authorities have delegated powers, where as some LPA's do not have an in house heritage officer. Therefore, under the proposals, Cadw would have to approve potentially whole, large scale applications including the planning aspects of the proposed development. This would add a huge strain on their resources picking apart a large amount of documentation to ascertain the heritage element of the development. LPA's with delegation would require the named officer to approve the planning and the listed building parts of the application, unnecessarily adding to internal bureaucracy. In cases of national importance Cadw has the option to 'call in' applications for determination currently the number of applications that are actually called in is very few. Concerns are raised that this power will be exercised far less often, or at all if the 'call in' involves planning related issues as well.

13.152 *Mid and West Wales Conservation Officers Group:* It is unclear how the applications for 'Heritage Development' will be reviewed in the context of Cadw's role. The implications of a shared consent regime would seem to be that all 'Heritage Development' applications would need to be referred to Cadw with the ensuing resource implications for them, and inevitable delays for the applicants. Currently delegation of listed building consent has been awarded to named officers within 5 planning authorities (for certain works to Listed Buildings to be approved without Cadw's involvement). However, in other areas there are no dedicated officers, or the area is vast and covered by one member of staff. Cadw's ongoing approach is to roll out delegation across Wales and encourage shared use of delegated officers. The proposal to combine consents doesn't seem compatible with Cadw's plans to extend delegation – indeed, it is likely that delegation would be incompatible with the proposed changes to legislation.

Concern as to loss of ecclesiastical exemption

13.153 *Churches' Legislation Advisory Service and Cytûn (Churches Together in Wales):* We note that the Law Commission proposals as currently presented involve not only codification and consolidation but also a substantial degree of amendment to existing practices. In particular, chapter 13 proposes to merge planning consent and listed building consent into a single system. We view this with considerable concern, not least because the Planning (Wales) Act 2015 and the Historic Environment (Wales) Act 2016 are of such recent provenance, and are not yet fully embedded in practice. Indeed, not all the statutory guidance has yet been completed. We would be concerned at the expenditure of further resource on extensive changes to practices so recently revised, and with which we are in general content. The remainder of this response concentrates on one aspect of the proposals which is of particular concern

to a number of member churches of CLAS and Cytûn: the ecclesiastical exemption from listed building consent.

However, we are concerned that the issue of ecclesiastical exemption from listed building consent is nowhere mentioned. This ‘exemption’ applies to listed building consent only; no church building is exempt from the requirements of planning permission. If the two systems were to be merged as proposed in Chapter 13 of the Law Commission document, listed building consent as such would disappear and so – presumably – would the ecclesiastical exemption.

7. There are currently seven exempt denominations in Wales: the Church in Wales, the Church of England,4 the Baptist Union of Great Britain, the Baptist Union of Wales, the Methodist Church, the Roman Catholic Church and the United Reformed Church (which, we understand, is currently seeking of its own accord to end its exempt status in Wales, though not in England). The Church in Wales has some 1,300 churches, of which 9185 are listed. In addition to places of worship, the ‘exempt’ denominations also administer listed building approvals to buildings that are in the curtilage or attached to listed buildings. This can include boundary walls, ancillary buildings, Sunday schools, tombs, monuments and memorials.

8. Details of the exemption are contained in the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 19946 and the controls operated by the respective denominations are set out in The Ecclesiastical Exemption — What is it and How it Works,7 published by the Department of National Heritage in 1994. However, as part of the reform of policy advice and guidance that is accompanying the Historic Environment (Wales) Act 2016, a new Ecclesiastical Exemption Order is due to be laid before the Assembly during 2018. Member churches of Cytûn and the Welsh Historic Places of Worship Forum have already had substantial engagement with Cadw as the draft Order and associated guidance are developed.

9. A previous Welsh Assembly Government commissioned an independent report into the operation of the ecclesiastical exemption, which was published in March 2005. Exempted denominations in Wales were asked to submit their written observations on the report – following which further consideration would be given to future arrangements – and it was subsequently agreed that the exemption should continue. In the course of the passage of the Historic Environment (Wales) Act 2016 a group of amendments on ecclesiastical exemption was debated in the National Assembly. The Deputy Minister for Culture, Sport and Tourism at the time, Ken Skates, opposed them and drew attention to the fact that the Welsh Historic Places of Worship Forum had held its first meeting in the week before the amendments were debated, noting that the Welsh Ministers kept the operation of the exemption under regular review and had made a commitment to update the guidance for exempt denominations. The amendments were defeated.

10. We would not wish the issue of ecclesiastical exemption to be swept up into any more general consideration of listed building consent, by default or through oversight, for the following reasons.

11. First, the exemption was granted on the basis that, as noted above, the exempt denominations would put in place controls that were no less stringent than controls exercised by local authorities. In reality, most church controls are more stringent than

the secular controls, not less. For example, in the Church in Wales the faculty jurisdiction applies to all churches – whether listed or not – and it applies to interior fixtures and fittings as well as the exterior appearance of the building.9 The Methodist Church requests copies of repair schedules to ensure that the materials and techniques to be adopted are sympathetic to the building in order to ensure a high standard of craftsmanship and materials in the repair of its churches.

12. Secondly, Paragraph 13.7 states that merging separate consent regimes should result in efficiency savings. However, as Cytûn pointed out in a recent submission10 to the National Assembly's Culture, Welsh Language and Communications Committee during its inquiry into the historic environment, the current exemption represents good value for the taxpayer because it relieves local authorities of the obligation to consider listed building consent on a large number of ecclesiastical buildings (10% of the total) while retaining the necessity for the exempt denominations to consult those authorities. The loss of ecclesiastical exemption as part of the loss of listed building consent would increase rather than reduce the costs on local authorities, whose planning and building conservation services are already under considerable resource pressure.

13. Thirdly, the current ecclesiastical exemption system also requires that the condition of each building subject to it be inspected every five years to inform decision-making; and proposals for alterations are given detailed consideration by experts knowledgeable about ecclesiastical buildings and their use. (So far as we are aware, there is no obligation on owners to undertake quinquennial inspections of secular listed buildings.) The current system also helps to ensure that such buildings remain in regular use – which is by far the best way to ensure their preservation.

14. Fourthly, like the Church in Wales, most of the exempt denominations apply similar procedures for proposals to their unlisted buildings, so the exemption gives a measure of protection to those as well – and just because a church is not listed does not mean that it is without architectural or townscape merit.

15. Fifthly, the 'exempt' listed building approval procedures are not target driven and consequently, do not operate a 6 to 8 week application target. This means that church decision-making bodies very rarely have to refuse an application, instead preferring to operate through negotiation and conversation until a compromise is reached that allows the continuation of mission as well as the conservation of the building. Each 'exempt' denomination maintains an independent Listed Buildings Advisory Committee.

16. The Methodist Church's Committee, for example, is made up of experts in mission but also in architectural history, knowledge of the history, development and use of Methodist chapels, knowledge of Methodist liturgy and worship, knowledge of archaeology and experience of the care of historic buildings and their contents. Some members are also specialists in stained glass or structural engineering and they are all willing and prepared to attend site visits to churches in Wales to advise on their specialism if this is required. A copy of the church's decision is sent to the consultees to ensure transparency and the Methodist Church across Britain reports that in the past five years there have been no appeals. In the Church in Wales, each diocese has a Diocesan Advisory Committee (DAC) which includes members with expertise

in particular areas relating to church buildings such as architecture, organs, and archaeology. The DAC's main role is to advise the Chancellor of the Diocese on applications for faculties; in addition, the DAC is always willing to give advice to parishes prior to their making faculty applications.

17. Finally, we would suggest that the substantially-reduced number of local authority building conservation officers cannot always be particularly expert in the care and use of ecclesiastical buildings. However important as architectural heritage, churches are primarily places of worship; and as patterns and styles of worship change, the interior arrangements and fittings of churches sometimes need to change as well. The ecclesiastical exemption allows such matters to be fully considered by those who understand them, without reducing the protection offered to the historic building as such.

18. We would argue that, if the listed building consent and planning controls were merged, this could result in the end of or the dilution of the conservation specialism in Wales, thus negatively impacting on the quality of advice and the standard of conservation of the Welsh Historic Environment. The current system means that Church-resourced posts help to enhance this environment at no additional cost to the public purse. The Methodist Church, for example, has a dedicated Conservation Officer who can provide consistent advice and knowledge of best practice throughout the Methodist Connexion of churches. This includes disseminating information on uses, partnership working, grants and financial assistance and successful re-ordering projects. We believe that the result of a merging of the systems could be that decisions about alterations to churches that do not currently require planning consent would be taken by local authority staff without the necessary professional expertise in conservation.

19. In conclusion, we would argue that the current system strikes an appropriate balance between the need to preserve the historic built heritage and the needs of worshippers: any changes are under the control of people with expertise in building conservation who also understand how churches are to be used.

20. As noted above, the Ecclesiastical Exemption Order for Wales and the associated guidance are currently being revised. We believe that it would be premature for the Law Commission to make any specific recommendation on the future of the exemption in advance of that review.

13.154 *PINS:* Also, is there a need to reconcile the works covered by Ecclesiastical Exemptions? Where the exemption applies, the practical effect is that listed building consent is not required for the alteration or extension of a listed ecclesiastical building of any denomination provided that the building is used for ecclesiastical purposes both before and after the works. Planning permission is, however, required. If the listed building consenting regime is replaced, the works potentially become heritage development requiring planning permission and the exemption would no longer have effect? This may or may not be a desirable consequence of the changes.

13.155 *Monmouth Diocesan Advisory Committee for the Care of Churches:* On behalf of the Monmouth Diocesan Advisory Committee for the Care of Churches, we specifically wish to register our concern in relation to Chapter 13, which proposes to merge the Listed Building Consent and Planning Permission regimes. It would seem that, one

(possibly unintended) consequences of this, is that the Ecclesiastical Exemption would fall, along with the substantial body of conservation knowledge found in the respective Dioceses. Potentially, this would result in significant financial impact for our parishes, who would be charged to obtain the necessary consent under the secular system. In this scenario, they would also lose access to the considerable body of voluntary expertise and support, currently available to them. Additionally, it would increase the burden on the already over-stretched Local Planning Authorities.

13.156 *Monmouth Diocesan Advisory Committee for the Care of Churches:* The Ecclesiastical Exemption Order and Guidance is in the process of being reviewed and refreshed, to ensure that it meets the standards set by the secular Listed Building Consent system. It would be ironic if this welcome strengthening of ecclesiastical heritage protection were to be undermined by the loss Listed Building Consent.

13.157 *Diocese of Llandaff:* A merger of Planning Permission and Listed Building Consent could mean necessarily that the Ecclesiastical Exemption would fall, losing the substantial conservation knowledge found in the respected Dioceses and including parishes in costs which our free to use system do not incur. We are concerned that hard pressed Planning Departments may not have the specialist knowledge required for the repair and adaptation of places of worship and would urge further detailed examination of this particular area of heritage care.

13.158 *Cardiff Council*: Ecclesiastical Exemption: No reference is made to the implications for exemptions. This is an example that illustrates the benefit of maintaining two consents, where LPAs determine planning applications and LBC matters are addressed through the relevant denomination's procedures. In a merged system it is unclear how this might operate, however it is difficult to envisage a system that would be simpler than the existing.

13.159 *Institute of Historic Building Conservation (Wales):* Ecclesiastical Exemption: Ecclesiastical Exemption is by definition an exemption, and it is an exemption from Listed Building Consent, not from planning permission. Logically, if Listed Building Consent was to be abolished, the Exemption would lapse. It is not clear whether this possible 'unintended consequence' has been given due consideration.

13.160 *Ancient Monuments Society:* the Ecclesiastical Exemption is, by definition, an exemption from Listed Building Consent, not from Planning Permission. Logically, if Listed Building Consent were to be abolished, the exemption would lapse. It is not clear whether this possible 'unintended consequence' has been given due consideration.

13.161 *Wales Heritage Group:* Ecclesiastical Exemption is by definition an exemption, and it is an exemption from Listed Building Consent, not from planning permission. Logically, if Listed Building Consent was to be abolished, the Exemption would lapse. It is not clear whether this possible 'unintended consequence' has been given due consideration and if it were to lapse then additional complication may arise from the need to preserve this exemption with planning legislation. This review places the Ecclesiastical Exemption in an anomalous position at the same time as Cadw is reviewing its role and providing comprehensive guidance for its future

13.162 *Council for British Archaeology Wales:* Ecclesiastical Exemption is by definition an exemption, and it is an exemption from Listed Building Consent, not from planning permission. Logically, if Listed Building Consent was to be abolished, the Exemption would lapse. It is not clear whether this possible 'unintended consequence' has been given due consideration.

CONSULTATION QUESTION 13-1(2).

We provisionally propose that the control of works to historic assets could be simplified by:

(1) **amending the definition of "development", for which planning permission is required, to include … the demolition of a building in a conservation area;**

(2) **removing the requirement for … conservation area consent to be obtained for such works; and**

(3) **implementing the additional measures outlined in Consultation questions 13-2 to 13-8 to ensure that the existing level of protection for historic assets would be maintained.**

Do consultees agree?

Note: responses referring to conservation area consent are dealt with under this heading; those relating solely to listed building consent are dealt with under heading 13-1(1) above.

Number of responses

13.163 Total: 31 (16 in agreement with merging conservation area consent, 5 equivocal responses, and 10 disagreeing).

Responses in agreement with merging conservation area consent and planning permission

13.164 *PINS:* PINS agrees that the control of works to historic assets could be simplified by amending the definition of 'development' to include 'heritage development'. However, should there be provision in 1(b) to include works which affect the setting of a listed building? It is agreed that removing the requirement for listed building consent and conservation area consent to be obtained would certainly simplify the process of obtaining permission, and avoid unnecessary duplication which is an inevitable consequence of two systems of control which overlap. It would also be clearer to those seeking to obtain consent if there were only one regime. PINS see no reason why these measures would not ensure that the existing level of protection for historic assets is retained, since it would represent a change to the regime only and not the principles of conservation.

13.165 *Country Land and Business Association:* Merging CAC and planning permission would not be transformational: it does not greatly reduce workload either for the applicant or the local authority, because in practice where there are two applications they are usually identical and handled identically by the local authority. It would

however appear to be a worthwhile simplification. This change has already been made in England, where it appears to have been generally effective and popular, attracted little opposition, and does not seem to have led to any reduction in heritage protection or other substantive problems. In the absence of any such issues, this would (we assume) be uncontroversial in Wales, and the amendments made to English legislation should provide a helpful prototype for Welsh legislation. We therefore support this proposal.

13.166 *Carmarthenshire County Council:* We would support the merging of Conservation Area Consent with Planning Permission in Wales as was undertaken in England following the Penfold Review of 2009.

13.167 *Monmouthshire County Council:* We consider that the proposal to mere planning permission and Conservation Area consent is a separate issue to the above proposals. The changes have been made in England and that this would bring the English and Welsh legislation in line with each other.

13.168 *Pembrokeshire Coast NPA & National Parks Wales:* After the Penfold Review of non-planning consents in England – where, instructively, sweeping changes were rejected due to resource issues - conservation area consent was merged with planning permission. We would support a parallel change in Wales. We are surprised to read that such applications are relatively few (paragraph 13.98). Within the PCNPA, we have had 11 such applications within the last six years. The buildings in question have all been of low architectural/historic interest and their demolition might as easily have been dealt within a planning application.

13.169 *Merthyr Tudfil CBC:* Merging Cons area consent with PP could be advantageous.

13.170 *Ceredigion CC:* Whilst the merging of Planning Permission and Conservation Area consent could probably be merged without too much confusion, to deal with Listed Buildings in the same manner would have the effect of reducing the importance of the Listed Building designation.

13.171 *Gwynedd Council:* In relation to Conservation Area Consents however, Gwynedd only deal with a small number of applications in any one year and it is acknowledged that there is scope for some sort of alteration / assimilation here.

13.172 *Mid and West Wales Conservation Officers Group:* We would support the merging of Conservation Area Consent with Planning Permission in Wales as was undertaken in England following the Penfold Review of 2009.

13.173 *Allan Archer:* I don't think the demolition of a building in a Conservation Area raises the same degree of concern as the Listed Building Consent issue and the numbers of applications is relatively modest. Subject to the consequential provisions introduced in England as explained in para 13.32 and the retention of the duty in s72 of the LBA1990, I do not feel as strongly about the proposed change relating to Conservation Area Consent, particularly as demolition already falls clearly within the definition of development.

13.174 *Historic Houses Association:* Conservation area consent: Moving to a single application system for conservation areas has already happened in England, and has

– as far as we are aware – improved efficiency without reducing heritage protection. HHA Members are in favour of a similar approach in Wales.

13.175 *Llandaff Conservation Area Advisory Group:* Llandaff Conservation Group agrees that the current 3 types of authorisation (planning permission, listed building consent and conservation area consent) does lead to undue complexity. The Group sees the advantage, in terms of improved simplicity, of merging heritage consents with planning permission. However the Group considers it vital that this is not seen as down-grading the importance of heritage nor should it result in less detailed consideration of heritage aspects of planning applications. It is thus essential that such simplification is accompanied by the duty on Local Authorities to consider heritage matters as proposed in Section 5-4.

13.176 *Society of Antiquaries of London:* While we understand the concerns that the most substantial practical proposal of the document, concerning the merger of Planning Permission, Listed Building Consent and Conservation Area Consent into one consent, could be perceived as de-prioritizing and downgrading the legal protection of heritage assets under Planning Law, we are reassured by the repeated and unambiguous assurance and indeed emphasis that no diminution of protection is intended. We therefore cautiously support the proposal put at Question 13-1, and therefore the consequential proposals at Questions 13-1 to 13-8. We would, however, strongly advocate that the express commitment to maintaining effective heritage protection should be conditional on it being given substance by including an explicit requirement that in considering applications for development involving heritage assets (buildings and sites), planning authorities must seek and take account of specialist heritage conservation advice, and therefore must also have access to such advice on an established basis. This would then be consistent with the placement of Sites and Monuments Records (SMRs) on a statutory basis under the Historical Environment Act (Wales) (2016).

13.177 *The Law Society:* There is clearly an opportunity to have greater simplification through the introduction of a unified consent which would encompass listed building consent, conservation area consent and planning permission.

There are already linkages between the planning system and the definition of sustainable development in the Well-being Act which acknowledges the promotion and protection culture, heritage and the Welsh language as components of the Well-being objective of “A Wales of vibrant culture and Welsh language”* as well as proposals for national significant infrastructure projects which have a unified consent in the Development Consent Order (which merges planning permission, listed building consent and scheduled monument consent amongst others). We note that experience with nationally significant infrastructure projects under the Planning Act 2008 has not to date revealed any procedural problems or lessening in the protection of listed buildings.

We would however note caution with regards the details that would be required to follow through any unification though, to ensure that the relevant safeguards for the historic environment are maintained. For example, the ability to be able to clearly distinguish between the various regimes (planning permission only; listed building consent/conservation area consent only; and combined consent) is vital to ensure

that there are no misunderstandings or unintended consequences arising. Also, the need for clarity regarding the basis for determination of such unified applications and the relationship between the development plan and the "special regard" elements of determination. There will also need to be clarity on the extent to which criminal offences will apply to the unified consent (so as the maintain the current situation when there is a breach of listed building consent/conservation area consent).

13.178 *Huw Williams (Geldards)*: Agree with the proposal to simplify through unification of planning application, listed building consent application and conservation area consent procedures and to remove unnecessary supplication which is largely a result of the evolution of heritage asset protection as a parallel system.

Equivocal responses

13.179 *Pembrokeshire CC:* 13-1 (1) (c): There is merit in placing the demolition of a building in a conservation area (Conservation Area Consent) under the umbrella of planning permission (although maybe not the proposed and confusing moniker "heritage development") as the current system for dealing with Conservation Area Consent for demolition is effectively a replication of the system for dealing with listed building consent for demolition. This provides a blanket approach for this kind of application in a Conservation Area and means that structures of poor quality and relatively modern construction are brought into it also. It could effectively be dealt with via a planning condition, and consultation with the Conservation Officer in most cases. We do not agree with the proposal for it to be brought under the definition of development for which planning permission is required as indicated in 13 -1 (1) (c) as this definition is inherently confusing, again for the reasons discussed above.

13.180 *Society for the Protection of Ancient Buildings:* The merging of Conservation area consent with planning permission: Given that the proposed reform in Wales has already been implemented in England, it is understandable that the review would seek to rationalise the permissions required for demolition within conservation areas in Wales. However, again we would state there is not overwhelming evidence that conservation area consent causes real problems in practice, and would suggest that it would be wise to allow the reform in England to bed in and assess its effectiveness (whilst recognising that alternative circumstances apply in Wales) before reform is made in Wales.

13.181 *Chartered Institute for Archaeologists:* The merger of conservation area consent with planning permission is a slightly different issue, although the question remains whether its existence has caused real problems in practice. We accept that the reform envisaged in Wales has already been implemented in England, but it would be wise to allow the reforms there to bed in and assess their effect, recognising nonetheless the differing circumstances that apply in Wales.

13.182 *RTPI:* The crux of the issues in relation to this chapter relates to the unification of consents and removing the requirement for listed building consent and conservation area consent. Many of the other key elements and questions flow from this central question. We have therefore not directly addressed the consultation questions set, but instead consider below the unifying of these consents and the options set out in the consultation paper.

Based on the information provided in the consultation document, our existing position and the information and views provided by our members, RTPI Cymru believes that further discussion is required regarding the unification of conservation area consent

13.183 *Wales Heritage Group:* The Group notes that, in England, Conservation Area Consent was merged with planning permission in 2013 and that the Planning Act 2008, introduced a new system of "development consent" for major infrastructure projects, which avoided the need for separate 'heritage' consents. However, there have been no studies of the implications of these changes and we would consider it prudent to review how the changes have maintained the protection of the historic environment and / or achieved any or all of the aims set out above in England before considering extending this change or implementing a similar system in Wales.

Responses disagreeing with merging conservation area consent and planning permission

13.184 *Cardiff Council*: CAC: While it is accepted that merged consents now exist in England, to remove the specific requirement for CAC would appear to weaken the clarity associated with this specific consent regime, particularly in the context of the new requirement for Heritage Impact Assessments. Retaining separate permissions retains the focus on the two very different issues of 'principle' and the acceptability of the proposals for redevelopment.

Most application issues regarding CAC seem to be caused by semantics (given the apparent similarity to 'LBC') as opposed to any concern regarding duplication. Uncertainty seems to have reduced following the provision of clearer explanations and help regarding application types via the Planning Portal. To further reduce doubt, redefining CAC demolition as development requiring a separate 'planning permission for demolition in a conservation area' (or similar) would be the preferred approach. This would have the advantage of closing the loophole that currently allows the partial demolition of walling through Part 31 of the GPDO (without the requirement for putting in place an Article 4(2) direction).

13.185 *Ancient Monuments Society:* we are reminded in the document that Conservation Area Consent has been subsumed into Planning Permission in England but not in Wales (see Paragraphs 13.32, 13.33 and 13.62 of the consultation). This is because, as we understand it, representations against the idea persuaded those behind the Historic Environment (Wales) Act not to include it. The fears about perceived loss of control and the downgrading of conservation areas voiced by others must have been taken on board.

Conservation Area Consent, in essence, acts for the protection of the broader appearance of a conservation area, including unlisted buildings. Listed Building Consent is designed for the protection of individual buildings, all of which have been granted this bespoke regime of protection because they are formally and expressly recognised by Government as being "special". If it has been concluded that Conservation Area Consent (in essence for the protection of unlisted buildings) deserves to retain its separate identity, how much more worthy of retention is the Listed Building Consent regime which deals only with structures that are listed?

13.186 *Pembrokeshire CC:*: We do not agree with the proposals for the removal of the requirement for Listed Building Consent for the reasons considered above, and do not consider that this approach is the correct one for the removal of the requirement for Conservation Area Consent either.

13.187 *Wales Heritage Group:* the WHG has significant concerns with the proposals in Chapter 13 which suggests merging listed building consent and conservation area consent with planning permission, resulting in a single consent process. The Group does not consider that the proposals as suggested would achieve the undertakings as expressed in the consultation document and as set out above. This will be addressed in more detail below.

In summary the Wales Heritage Group strongly objects to the proposals to merge listed building consent and conservation area consent with planning permission.

13.188 *National Trust*: In its current form the proposal put forward would diminish expertise and put at risk the significance currently afforded the historic environment in Wales. The unintentional consequence would be that the historic environment would be diminished as a consideration within the planning regime and there would be a reduction in the quality of decision making. In relation to the proposal in Chapter 13 we do not see the benefits of merging listed building consent and conservation area consent with planning permission and do not support the proposal put forward.

13.189 *Aberystwyth & District Civic Society:* The Civic Society views with concern the proposal to merge listed building consent and conservation area consent with planning consent in Wales.

13.190 *Theatres Trust:* The Trust strongly objects to these proposals, and would reiterate comments made during the previous scoping consultation. We feel that to merge planning permission with listed building consent and conservation area consent would undermine the status of Wales' heritage assets and historic environments, and would undermine the ability and duty of planning authorities to protect such assets.

13.191 *Dr Martin Cherry, FSA:* By placing conservation generally within planning, listed building consent was seen by legislators as the key element in safeguarding those features of a listed building that gave it its 'special architectural or historic interest'. It is the only statutory mechanism that requires that specific consideration be given to a listed building's special interest. It takes specific (and carefully defined) conservation considerations temporarily out of the planning process which is concerned primarily with development . (The same argument applies to conservation area consent.)

13.192 *Pippa Richardson:* I am most concerned about the recommendation in Chapter 13 to merge planning permission, listed buildings consent and conservation area consent into one planning consent (para 13.5).

13.193 *Gwynedd Archaeological Trust:* We are concerned that, by merging listed building consent, conservation area consent and planning consent, the special qualities of listed buildings and conservation areas will be lost. Any merger would need to ensure that the full qualities, including setting and curtilage, of listed buildings be recognised at the outset, and the consent considered within these parameters. This requires a

level of expertise not usually expected of planning officers, and therefore they would need to be advised by building conservation staff qualified to advise on these issues. It is therefore essential that future changes to the process ensure the provision of this advice will be given by appropriately qualified persons in cases involving listed buildings and conservation areas.

CONSULTATION QUESTION 13-2.

We provisionally propose that the power to make general and local development orders should be extended to enable the grant of planning permission by order for heritage development. Do consultees agree?

Number of responses

13.194 Total: 39 (15 in agreement, and 24 in disagreement; 5 other comments).

Responses in agreement (without further comment)

13.195 ICE Wales, Merthyr Tudfil CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government, Keith Bush, Monmouth Town Council, Neath Port Talbot CBC; PEBA; Huw Williams (Geldards)

Responses in agreement (with additional comment)

13.196 *PINS:* The ability to make local and general development orders does not seem to be unreasonable, and has the potential to provide a degree of certainty for potential investors, developers and businesses in respect of some aspects of heritage development. Whilst it would be for the Authorities to consider whether it is appropriate to make such orders, it would be another provision available for dealing with particular categories of works that need not go through the usual consenting regime.

13.197 *Canal & River Trust:* [F] The Trust owns the third largest collection of protected historic buildings in England and Wales. In Wales alone we have 223 listed buildings, including assets such as locks which are vital to the continued operation of the waterway network. Whilst we are a charity, we are also a statutory undertaker for our network and we employ heritage advisors who specialise in and care for our canal heritage.

In light of the above, we do consider that it would be valuable for powers to be extended to reflect the listed building consent orders and local listed building consent order regime which is available in England. The Trust is pursuing a listed building consent order in England.

13.198 *CLA:* Yes. That would be desirable whether or not the merger proposal is enacted.

13.199 *Historic Houses Association:* Yes, we agree. This power should be implemented whether or not the proposed merger of listed building consent and planning permission is enacted.

13.200 *Rhondda Cynon Taf CBC*: Agree – There will be a need for Development Orders to define what in terms of alterations to heritage assets are exempt from the need for formal consent.

Equivocal responses

13.201 *The Law Society:* We agree. We further note, however, the uncertainty as to how certain provisions introduced by the Enterprise and Regulatory Reform Act 2013 in England are being applied. Rather than introducing them to Wales, a better understanding as to whether they are being used and how LPAs are finding these powers would be useful.

Responses disagreeing (without further comment)

13.202 Barry Town Council

Responses disagreeing, on the basis of opposition to Proposal 13-1

13.203 *Allan Archer, Society for the Protection of Ancient Buildings, Chartered Institute for Archaeologists, Pembrokeshire Coast NPA, National Parks Wales:* As a consequence of my/our views on 13.1, I/we do not support this proposal.

13.204 *South Wales Conservation Group, Monmouthshire CC:* We do not agree that the power to make general and local development orders should be extended to enable the granting of planning permission by order for heritage development. We disagree in principle of combining listed building consent and planning permission. Each building has its own unique significance, how can you impose generic definitions in any way on these? Authorities agreed it was difficult to envisage where this power could be used.

13.205 *Ceredigion CC:* CCC does not agree that the power to make general and local development orders should be extended to enable the grant of planning permission by order for heritage development. CCC disagrees with the underlying principle of unifying listed building consent and planning permission as this will reduce the LPA's power to preserve its Historic Buildings.

13.206 *Theatres Trust:* The Trust has concerns about this proposed power. As per our response to Question 13.1, we object to the merger of planning permission and listed building consent. By extension, we also object to this proposal which could serve to dilute the proper consideration of heritage issues in decision making.

13.207 *Pembrokeshire CC:* As highlighted above, disagreement with the proposed changes in 13-1 makes the consideration of these additional measures to ensure existing level of protection is maintained largely irrelevant. With the exception of certificates of lawful development (CLOPUD) and (CLEUD), a system which is not fit for purpose for listed buildings in any case. Each listed building is different and the question of lawful works involves an element of subjective judgment that involves professional experience and most usually inspection of the building in question.

13.208 *Institute of Historic Building Conservation:* Heritage development should not be permitted by a development order. This is very much predicated on the introduction

of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support.

13.209 *Cardiff Council*: No, because we do not agree with the proposal to redefine listed building consent as heritage development. The diversity of listed buildings makes this impractical and undesirable.

Other responses disagreeing

13.210 *Nigel Hewitson:* I think granting planning permission for heritage development by development order is potentially problematic. If one takes minor residential extensions as an example, the current GPDO focuses on the size of the extension and its proximity to neighbouring properties. In the case of heritage development, there would need, on a case by case basis, to be consideration of the effect of an extension on the special architectural or historic interest the historic asset possesses which might be difficult to provide for in a development order. I would err on the side of caution and say heritage development should not be permitted by a development order. Indeed, I would go further and say that the opportunity should be taken to amend the existing GDPO to exclude works to or development affecting the setting of historic assets from ALL permitted development rights. As things stand there is a good deal of inconsistency as to which permitted development rights apply to historic assets and which do not.

13.211 *Caerphilly CBC and POSW South East Wales:* No, because each listed building is different, and framing a general or local development order, which are by their nature general in approach, that applied to many listed buildings would be difficult without potentially threatening the fabric of those buildings. In which case, it is unlikely they would be used, and therefore the power is unnecessary.

13.212 *Blaenau Gwent CBC:* It is difficult to envisage a scenario where an LDO would be a suitable approach given that listed buildings are often unique or require an individual approach rather than a generalised one.

13.213 *Carmarthenshire CC:* It is difficult to comment on this approach. Within Carmarthenshire it is hard to envisage where this power would be of use in relation to heritage generally – particularly in terms of listed buildings which each have their own bespoke listing.

13.214 *Llandaff Conservation Area Advisory Group:* No, we consider the use of development orders to be incompatible with the degree of detail necessary to ensure proper conservation and preservation of heritage assets.

13.215 *Newport City Council:* No, they are separate considerations.

13.216 *Torfaen CBC:* No. It is important to maintain strict control over listed buildings. The ability to make development orders in respect of works to listed buildings should therefore be avoided.

13.217 *Peter Thomas:* I have significant concerns regarding a general permitted heritage development order. What kind of heritage development will be appropriate for all

listed buildings across the entire country? There may be some scope for a local order, perhaps where there are a group of identical buildings – perhaps a terrace of houses – but not across the whole of Wales. Alternatively, it might be argued that if there is a particular set of works that could benefit from a general permission then perhaps they would not affect the special interest of the listed building and would not require consent in any event? have significant concerns regarding a general permitted heritage development order. What kind of heritage development will be appropriate for all listed buildings across the entire country? There may be some scope for a local order, perhaps where there are a group of identical buildings – perhaps a terrace of houses – but not across the whole of Wales. Alternatively, it might be argued that if there is a particular set of works that could benefit from a general permission then perhaps they would not affect the special interest of the listed building and would not require consent in any event?

13.218 *Mid and West Wales Conservation Officers Group:* Each building has its own unique significance and the members of the Mid and West Wales Conservation Officers group struggled to see how one can impose generic definitions in any way on these. Authorities agreed it was difficult to envisage where this power could be used. Therefore, we do not agree that the power to make general and local development orders should be extended to enable the grant of planning permission by order for heritage development.

13.219 *Bridgend CBC:* No. As each listed building has its own unique significance and value, the use of general and local development orders would be inappropriate to enable the granting of planning permission by order for heritage development. Heritage Partnership Agreements are the preferred mechanism that was recently introduced to enable this approach, the main difference being that these agreements are site/building specific.

Other comments

13.220 *Institute of Historic Building Conservation (IHBC):* Paragraph 13.105, hints at exempting internal works affecting curtilage buildings from the requirement to obtain the proposed new unified consent. This raises concerns that until the significance of curtilage structures to the special character of a listed building are fully understood it would be inappropriate to assume that internal alterations to such structures would not affect the character of the principle building, for example internal joinery and machinery linked to its function.

13.221 *Institute of Historic Building Conservation (Wales)*: Ordinary householders currently have a number of 'permitted development rights' which allow them to undertake minor works without the need for PP. This does not apply to listed buildings. Whilst these rights would not extend to listed buildings in the proposal, it is inevitable that owners of listed buildings would undertake potentially damaging minor works, as their neighbours have legally done, simply through a misunderstanding of the differences between the status of their properties. In addition, it is currently the case that details such as types of materials can be amended on a PP without course to a full scrutiny. The consultation uses the example that "when one type of brick has been approved, a similar one could readily be substituted", this could have major impacts for a listed

building and even if listed buildings were excluded from this, how would an owner be expected to understand the procedure. It is hardly simplification.

13.222 *Wales Heritage Group:* The consultation suggests that it might be appropriate to use Article 4 Directions to ensure that works such as those relating to internal features of a listed building or curtilage buildings require planning consent or that there be different limits for development affecting a listed building or conservation area. It is the group's experience that the use of Article 4 Directions is particularly confusing for the general public and frequently result in unauthorised works being inadvertently carried out. To have different limits for development for designated historic buildings would also therefore cause confusion and would be little different to the situation with the existing legislation.

13.223 *Council for British Archaeology Wales:* Ordinary householders currently have a number of 'permitted development rights' which allow them to undertake minor works without the need for PP. This does not apply to listed buildings. Whilst these rights would not extend to listed buildings in the proposal, it is inevitable that owners of listed buildings would undertake potentially damaging minor works, as their neighbours have legally done, simply through a misunderstanding of the differences between the status of their properties. In addition, it is currently the case that details such as types of materials can be amended on a PP without course to a full scrutiny. The consultation uses the example that "when one type of brick has been approved, a similar one could readily be substituted", this could have major impacts for a listed building and even if listed buildings were excluded from this, how would an owner be expected to understand the procedure. It is hardly simplification.

13.224 *Peter Thomas:* There is no doubt that some of the definitions contained in the GPDO are confusing and it is, I would suggest, the secondary legislation that provides more scope for 'unnecessary complexity or inconvenience' with a substantial number of amendments to the GPDO and Regulations which are used by LPAs (and by extension applicants) on a daily basis. Whilst there may be a case for simplifying the primary legislation I would, respectfully, suggest the tidying up of secondary legislation would go significantly further to remove 'unnecessary complexity or inconvenience'.

CONSULTATION QUESTION 13-3.

We provisionally propose that heritage partnership agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed. Do consultees agree?

Number of responses

13.225 Total: 37 (14 in agreement, 6 equivocal responses, and 17 in disagreement).

Responses in agreement (without further comment)

13.226 Nigel Hewitson, CLA, Merthyr Tudfil CBC, Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government, Keith Bush; PEBA

Responses in agreement (with additional comment)

13.227 *Historic Houses Association:* Yes, we agree, on the grounds that at present many people do not see HPAs as being worth the trouble. If planning permission could be granted by order then that might encourage a greater uptake of HPAs, which would be a good thing.

13.228 *PINS:* Agreed, insofar as it would align with the intentions of the Historic Environment (Wales) Act 2016, subject to allowing for limitations by specifying the works to which the order applies.

13.229 *The Law Society:* Heritage partnership agreements are a useful innovation introduced in Wales under the Historic Environment (Wales) Act aimed at improving the management and adaptation for appropriate uses of heritage assets. We agree that it will be necessary for heritage partnership agreements to give planning permission for works which would now require listed building consent. The GPDO could make provision for a development which is in accordance with prescribed categories of development and to be carried out under a heritage partnership agreement.

13.230 *Canal & River Trust:* The Trust owns the third largest collection of protected historic buildings in England and Wales. In Wales alone we have 223 listed buildings and 7 conservation areas covering our network. We agree that heritage partnership agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed. Our preference however for our network is for the listed building consent orders and local listed building consent order regime to be made available.

13.231 *Huw Williams (Geldards)*: Heritage partnership agreements are a useful innovation introduced in Wales under the Historic Environment (Wales) Act aimed at improving the management and adaptation for appropriate uses of heritage assets. I agree that it will be necessary for heritage partnership agreements to give planning permission for works which would now require listed building consent. I suggest that the GPDO could make provision for a development which is in accordance with prescribed categories of development and to be carried out under a heritage partnership agreement.

13.232 *Rhondda Cynon Taf CBC*: Agree – but there needs to be a clear mechanism and limitations

Equivocal responses

13.233 *Monmouthshire CC:* We do not agree with the principle of merging consent regimes. However, in the event that this does happen HPA's should be capable of granting both the heritage and planning aspects of the application.

13.234 *Institute of Historic Building Conservation:* There is in our opinion however no reason why heritage partnership agreements should not be able grant permission of whatever type and form is proposed. Again, however, this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation

Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support.

13.235 *Peter Thomas:* Heritage Partnership Agreements are untested in Wales but if the concept of 'Heritage Development' were agreed this provision seems logical.

13.236 *Theatres Trust:* Should Ministers be minded to abolish listed building consent, we would support the ability of heritage partnerships to grant planning permission for heritage development. However, this proposal does not override the concerns we have set out previously and we would reiterate our objection to the merging of planning permission and listed building consent.

13.237 *South Wales Conservation Group, Bridgend CBC:* We would agree that Heritage Partnership Agreements should be capable of granting planning permission by order for heritage development in such categories as may be prescribed. However we do not accept the concept of 'Heritage Development', therefore would recommend that this approach be encouraged but only under the existing consent regime.

13.238 *Newport City Council:* Is this not the opposite to 13-2?

Responses disagreeing (without further comment)

13.239 *Barry Town Council:* Disagree.

Responses disagreeing, on the basis of opposition to Proposal 13-1

13.240 Chartered Institute for Archaeologists, Allan Archer, Society for the Protection of Ancient Buildings, Caerphilly CBC and POSW South East Wales

Responses disagreeing, for reasons given in relation to Proposal 13-2

13.241 Blaenau Gwent CBC, Llandaff Conservation Area Advisory Group, Pembrokeshire CC, Torfaen CBC; Cardiff Council

Other responses disagreeing (with additional comment)

13.242 *ICE Wales:* No. This is likely to cause confusion.

13.243 *Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, Mid and West Wales Conservation Officers Group:* We do not agree. We consider that heritage partnership agreements are in themselves a significant step in making the application process easier for applicants and agents, a process not yet tried and tested. HPAs typically involve large or complex sites and we consider that a single consent for such would involve a complex and large submission (not ideal for consultees /commentators) whereas the dual approach would both make the consultation process more manageable and allow potential for listed building consent to be granted in advance or separately, allowing for example desirable remedial works to proceed rather than awaiting the outcome of a single and potentially controversial application. It may be stated that a single consent regime could actually be damaging to listed buildings in this respect.

13.244 *Ceredigion CC:* CCC does not agree. CCC considers that heritage partnership agreements do make the application process easier for applicants. However the dual approach would both make the consultation process more manageable and allow potential for listed building consent to be granted in advance or separately, allowing for example desirable remedial works to proceed rather than awaiting the outcome of a single application which may be held up by a complex planning issue.

13.245 *Monmouth Town Council:* The Committee disagrees. We tend to agree with Civic Trust Cymru, who strongly objected to the proposal to merge within planning permission, listed building consent, as well as conservation consent. The Trust is concerned that there would be further loss of local authority conservation specialists as Conservation is side-lined.

CONSULTATION QUESTION 13-4.

We provisionally consider that the provisions (currently in sections 191 and 192 of the TCPA 1990) relating to certificates of lawfulness should be extended to include works that currently require only listed building consent or conservation area consent. Do consultees agree?

Number of responses

13.246 Total: 35 (21 in agreement, 5 equivocal responses, and 9 in disagreement).

Responses in agreement (without further comment)

13.247 ICE Wales, Merthyr Tudfil CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Canal & River Trust, Lawyers in Local Government, Keith Bush, PEBA

Responses in agreement (with additional comment)

13.248 *Nigel Hewitson:* I agree that certificates of lawful proposed development should cover heritage development (as certificates of lawful proposed works in England already do). I would also support certificates of lawful existing development being issued authorising work already carried out if, as I assume would be the case, such certificates would only certify that the works did not as a fact require planning permission either because the building or part of the building is not part of the listing, the works are not heritage development (e.g. partial demolition of an unlisted building in a conservation area which does not otherwise require planning permission) or because the works do not affect the asset's character.

13.249 *Caerphilly CBC and POSW South East Wales:* Yes, but as an independent change rather than as part of a unifying of planning and listed building consent regimes.

13.250 *CLA:* Yes. That would be very desirable whether or not the merger proposal is enacted.

13.251 *Historic Houses Association:* Yes, we agree in principle that this proposal should be implemented whether or not the proposed merger of LBC into the planning system

goes ahead. We are, however, concerned that this proposal may not have the effect that the consultation paper suggests (especially around reducing uncertainty, which would be very desirable) because the definition of curtilage is not adequately set out in legislation or guidance, and most listings do not specify the curtilage. For this proposal to work as the consultation paper envisages, it will be vital that curtilage is codified in a way that increases rather than decreases clarity and certainty (see our response to Q18-16 below).

13.252 *Llandaff Conservation Area Advisory Group:* Yes, provided that the heritage aspects of the work involved are given due consideration.

13.253 *Theatres Trust:* The Trust agrees that in principle provisions relating to certificates of lawfulness could be extended to listed building consent and conservation area consent, but we consider this could also be achieved through amending existing legislation rather than purely as a result of merging the three application types.

13.254 *Torfaen CBC:* Yes – this would be helpful as it is not always clear what does and does not need listed building consent. Such applications should be subject to a fee.

13.255 *The Law Society:* We consider that this could be a welcome and helpful consequence of the unification of the consents – but offer additional points below.

Under the Enterprise and Regulatory Reform Act there was provision for PROPOSED works to listed buildings being considered for the lawful development certificate. The difficulty with dealing with works that have already taken place is that if they did require LBC then it is a criminal offence, and it may not be clear cut the extent to which works have been undertaken, and by whom. With regards to conservation area consent, this relates to demolition of buildings – having a proactive approach – clarifying whether these works require consent (as it is unclear if the works are alteration or demolition) would be of assistance.

13.256 *Neath Port Talbot CBC:* Agreed. However if the procedures are not merged it would still be sensible to introduce a formal procedure to enable applicants to obtain a decision from a planning authority as to whether listed building consent is required in a similar way to that which operates for certificates of lawfulness.

13.257 *Huw Williams (Geldards)*: Agree that this is welcome and helpful consequence of the unification of the consents.

13.258 *Rhondda Cynon Taf CBC*: Agree – the certainty that this would bring to prospective applicants would be welcome given the potential implications of undertaking work only to find that a consent is required, however, the factors taken into consideration in determining the lawfulness of any given proposal would to some extent still be based in subjective judgement rather than a legal interpretation (Not sure if this is itself problematic).

13.259 *Society for the Protection of Ancient Buildings, Chartered Institute for Archaeologists:* No, as we strongly disagree with the merging of consents, but acknowledge this would be one of the merits of the reforms should they be implemented.

Equivocal responses

13.260 *Institute of Historic Building Conservation:* The proposal to extend S.191 of the TCPA 1990 appears to be similar to the "Certificate of Lawfulness of Proposed Works to a Listed Building" introduced under s.61 of Enterprise and Regulatory Reform Act 2013, that introduced a new Section 26H, 26I, 26J and 26 J to the Planning (Listed Buildings and Conservation Areas) Act 1990 in relation to England.

From experience this system appears to work and is considered appropriate in Wales in providing formal confirmation that proposed works of alteration or extension to a listed building do not require Consent because they do not affect the special interest of the listed building.

However, we would query extension of S.191 of the TCPA 1990 provisions to LBs or CAs to retrospectively approve existing uses. If unauthorised LB works remain criminalised (which we understand to be the intention), then it would be contradictory to allow those same works to become immune from action after a period of time as currently provided under s191 TCPA. This would also undermine the principle that it is essential to get advice before doing works that are potentially harmful to the historic environment; this is why these were not introduced by the Enterprise and Regulatory Reform Act 2013 in England.

It should not become possible to gain retrospective Listed Building Consent – only permission that lasts from the date of granting, as now. This then retains the ability to prosecute owners for failing to get permission regardless of whether they have subsequently gained consent for the work. This is essential to emphasising the principle of complying with the system, regardless of whether the breach is subsequently deemed acceptable. This principle is justified by the finite nature of historic fabric and the irreversibility of destroying it, and should be retained.

13.261 *PINS:* PINS agrees that the provisions relating to certificates of lawfulness under s192 of the Act should be extended to include works that currently require only LBC or CA consent. Such provisions would only be in respect of proposed works to a listed building that would not affect its character as a building of special architectural or historic interest. The Courts have held that this procedure is primarily aimed at cases where alterations are so small that they could not arguably affect the character of the building as one of special architectural or historic interest. One of the potential problems of doing so, however, is that the permission granted in respect of heritage development may be subject to conditions with which, if the applicant does not comply, would be an offence and thus not lawful.

In contrast, applications made under s191 relate to the existing use of buildings other land and / or any operations which have been carried out. Hence, the works could be extensive, having a harmful effect on the character of a building of special interest. It seems that a provision which allows such works to be lawful would be at odds with the duty to have special regard to the desirability of preserving a building of special architectural or historic importance, and potentially irreversible damage to the historic fabric. It would not discourage owners to carry out works first and then seek a determination that consent was not required afterwards, which would be problematic given the criminal sanctions that exist for carrying out unauthorised works to listed buildings.

13.262 *Blaenau Gwent CBC:* For CLOPUDS agree. For CLEUDS it is undesirable to introduce a means of immunity from action/lawfulness for works that may have been a criminal offence when implemented.

13.263 *Newport City Council:* A CLOPUD would have advantages and give certainty to applicants. However a CLEUD would not be appropriate and the regularisation of works should only be done through an application, where all the required information is part of statue.

13.264 *Peter Thomas:* I can offer some support to this in principle, however, there are some – significant – caveats to this. A danger of this mechanism will be the amount of information that will need to be submitted. For the most simple of tasks it will be straightforward, for example if someone wishes to apply a fresh coat of limewash to their house it is likely that this will not require consent. However, this is currently dealt with on an informal basis, usually via an exchange of emails. A requirement to complete and application form and purchase a site plan (with a north arrow) will, quite possibly, deter people from applying. Given the pressures on the limited number of officers in LPAs with the experience to undertake an appraisal the assessment of the certificate of lawfulness, even in more complex cases and is likely to be limited to a desk based appraisal. This will lead to a situation where a significant amount of information may need to be submitted for a meaningful answer being given.

13.265 *Pembrokeshire CC:* See 13-2 above.

Responses disagreeing (with additional comment)

13.266 *Allan Archer:* As a consequence of my views on 13.1, I do not support this proposal.

13.267 *Pembrokeshire Coast NPA, National Parks Wales:* We do not agree that certificates of lawfulness (for proposed works) should apply to works requiring only listed building consent. Listed buildings are a finite and precious resource, representing less than 2% of the historic building stock of Wales. They often require expert opinion (guided by the list description) as to what defines their character, how proposed works may affect such and whether consent is required. This involves an element of subjective judgement, is tempered by professional experience and balanced by the right of appeal. Further, many listed buildings are of multiple periods with hidden earlier fabric – for instance a remodelled medieval building or a timber-framed town house re-fronted in brick. Listed building descriptions -which in themselves are advisory only – are not exhaustive and many do not include interior descriptions. Issuing a certificate runs the risk of damage to important fabric hitherto unknown – and requires specialist input.

In our experience, a pre-application approach works best, allowing officer and applicant to meet on site, with consequent correspondence as to whether listed building consent is required or not and, if necessary, monitoring. This is routine work within most, if not all LPAs. In the context of planning control, the issue of certificates of lawfulness is usually a desk-top exercise, whereas with listed buildings, specialist input is required, given the nuances of each building. It is difficult to see how this change would prove beneficial to the applicant, but we do acknowledge that there is scope for formalization of pre-application procedure across Wales.

13.268 *South Wales Conservation Group:* We do not agree with the proposal for certificates of lawfulness as we do not believe they are a suitable alternative to Listed Building Consent. We would support the approach of pre application advice and guidance on site and in written form, where specialist input is required, as is now common practice for conservation staff across most Welsh Authorities. The most effective improvement to the system would be to formalise the pre application process. It is difficult to see how certificates of lawfulness could improve on this, as they are primarily a desktop exercise. However Non Material Amendments if applied to an LBC approval may assist the process and should be considered.

13.269 *Mid and West Wales Conservation Officers Group, Carmarthenshire CC:* We do not agree that certificates of lawfulness (for proposed works) should apply to works requiring only listed building consent. Members of the group agree that the aim is to support applicants at the pre-application stage often including a visit to a site and undertake written correspondence with the applicant to determine whether or not listed building consent is required. The nuances of individual buildings can rarely be appreciated without a visit or at least detailed knowledge of the building and we consider that a certificate of lawfulness is too blunt an instrument to be used on Listed Buildings. Whilst we do not think that a certificate of lawfulness is a suitable substitution for listed building consent we do think that the introduction of 'non-material amendments' to LBCs would be of benefit.

13.270 *Ceredigion CC:* CCC does not agree that certificates of lawfulness (for proposed works) should apply to works requiring only listed building consent. Listed Buildings make up only 2% of the building stock of the entire country. Granting Certificates of Lawfulness for works already carried out would be seen as a way of legalising work done unlawfully. It would basically legalise a work undertaken as a Criminal Act. Unscrupulous developers may well see this as an opportunity to by pass the Listed Building Consent process undertake the works and apply for a certificate. This may lead to the loss of many original features in Listed Buildings.

13.271 *Monmouthshire CC:* As each building is different, it would be very difficult to determine a certificate of lawfulness without a site visit and relevant details. Unlike the consideration of whether, for example determining if a proposal is permitted development or not. We would advocate the use of the pre-application advice service where officers can make contact with owners and agents, help to explain the process and build relationships with them. This is considered to be a more appropriate way of managing these types of enquiries.

13.272 *Bridgend CBC:* No. There are different issues to consider with applications for Listed Building Consent and Conservation Area Consent compared to a certificate of lawfulness. Additionally, this is not an issue that has been raised as we do not receive many queries about whether works require Listed Building or Conservation Area consent only. Certificates of Lawfulness are not considered to be a suitable alternative to Listed Building Consent. Support is, however, offered for the approach of pre-application advice and guidance on site and in written form, where specialist input is required, as is now common practice for conservation staff across most Welsh Local Planning Authorities. The most effective improvement to the system would be to formalise the pre-application process. It is difficult to see how certificates of lawfulness could improve on this, as they are primarily a desktop exercise with no

flexibility. However, Non-Material Amendments, if applied to an LBC approval, may assist the process and should be considered as an alternative.

13.273 *Cardiff Council*: No, because we do not agree with the proposal to redefine listed building consent as heritage development. A certificate of lawfulness for either proposed or existing development is not a suitable alternative to obtaining Listed Building Consent or the pre-application advice of conservation officers as to whether this is required (as now promoted within PPW - High Court declarations are unheard of in our experience). Formalising this process would be beneficial, however Cardiff have a process in place for this already, certainly where significant change is proposed. Applying Non Material Amendment provisions to LBC could be beneficial in some circumstances, as to require a completely new LBC for minor changes is often not practical.

CONSULTATION QUESTION 13-5.

We provisionally consider that the Bill should include provisions to the effect that:

(1) **any appeal relating to works to a listed building may contain as a ground of appeal that the building in question is not of special architectural or historic interest, and ought to be removed from the list of such buildings maintained by the Welsh Ministers;**

(2) **where a building is subject to a building preservation notice (provisional listing), the notice of appeal may contain a claim that the building should not be included in the list;**

(3) **the Welsh Ministers, in determining an appeal relating to a listed building, may exercise their powers to remove the building from the list; and**

(4) **in determining an appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.**

Do consultees agree?

Number of responses

13.274 Total: 38 (16 in agreement, 7 equivocal responses, and 15 in disagreement).

Responses in agreement (without further comment)

13.275 Nigel Hewitson, ICE Wales, CLA, Merthyr Tudfil CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Historic Houses Association, Neath Port Talbot CBC, Canal & River Trust, Lawyers in Local Government, Keith Bush, Huw Williams (Geldards)

Responses in agreement (with additional comment)

13.276 *PINS:* It is agreed that the Bill should include provisions which allow appeals to be made on the same basis as the current position. That is, equivalent powers should be retained.

13.277 *The Law Society:* Ensuring that the provisions currently available when dealing with listed building consent appeals being replicated to any combined consent would be welcomed.

13.278 *Theatres Trust:* In principle the Trust agrees with this proposal, but we request that such a provision is in place only where works to a listed building are proposed and not where they have already been carried out. If features of historic importance have already been removed without consent and that has undermined the value of the listed building as a heritage asset, that must not be reason to remove from listing and the appropriate punishment should be enforced irrespective of whether the appeal is allowed or dismissed.

13.279 *Institute of Historic Building Conservation:* This would only be supported if it is clear that in determining these grounds of appeal, the Welsh Ministers should only take into account whether or not the building meets the criteria, and not any other matters.

13.280 *Rhondda Cynon Taf CBC*: Agree – On all four points, presumably if such arguments are to be allowed they would have to be backed up with evidence to be debated by both sides.

Equivocal responses

13.281 *South Wales Conservation Group, Carmarthenshire CC, Mid and West Wales Conservation Officers Group:* We do not agree with this. The proposal is unnecessary. If we did accept the concept of Heritage Development then these provisions should be carried over into the new legislation. However, our position on 13-1 stands.

13.282 *Chartered Institute for Archaeologists:* If there is to be unification of consents as proposed, yes.

13.283 *Peter Thomas:* Notwithstanding the significant concerns raised at 13-1, if the concept of 'Heritage Development' were agreed this provision seems logical.

13.284 *Blaenau Gwent CBC:* 1) Do not agree. A process exists to seek removal from the list. Any enforcement action from the LPA that resulted in an appeal would require the LPA to deal with issues aside from that which prompted the action – the listing. That seems unnecessary and could be duplicated at subsequent appeals on the same site/building. (2) Agree – the building is not actually on the statutory list at this stage. (3) See answer to point 1. (4) Agree.

13.285 *Pembrokeshire County Council:* See 13-2 above.

Responses disagreeing, on the basis of opposition to Proposal 13-1

13.286 *Allan Archer, Society for the Protection of Ancient Buildings, Monmouthshire CC, Cardiff Council:* As a consequence of my/our views on 13.1, I/we do not support this proposal.

Other responses disagreeing (with additional comment)

13.287 *Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC:* The provision of a new ground of appeal that a building is not of special architectural or historic interest and ought to be removed from the statutory list seems unnecessary. In our experience, Cadw has been open to reviewing the listed status of an individual building, as a very small number – inevitably – were listed in error. De-listings have occurred for example when it has been demonstrated that a building had been much reconstructed prior to listing, or that the building is actually a lesser example of a type encountered when undertaking more recent resurvey work across Wales. The standard of list descriptions in Wales is exemplary and the choice of buildings very carefully considered by the listed buildings inspectorate, who continue to operate high standards whilst spot-listing.

In our experience, buildings listed in error are rare. The time to review the listing of any building is ideally prior to any unauthorized works being carried out and we see no reason not to formalize existing arrangements. Reviewing the listing through the appeal process runs the obvious risk of someone despoiling a building to the extent that it has reached the point of no return and may then be taken off the list – the resultant profit from development more than offsetting the costs of the appeal process and resultant fines for certain developers.

13.288 *Ceredigion CC:* CCC does not agree. The provision of a new ground of appeal that a building is not of special architectural or historic interest and ought to be removed from the statutory list seems unnecessary. In this Council's experience, Cadw has been open to reviewing the listed status of an individual building, as a very small number – inevitably – were listed in error. De-listings have occurred for example when it has been demonstrated that a building had been much reconstructed prior to listing, or that the building is actually a lesser example of a type encountered when undertaking more recent resurvey work across Wales. Reviewing the listing through the appeal process runs the obvious risk of someone trashing a building to the extent that it has reached the point of no return and may then be taken off the list – the resultant profit from development more than offsetting the costs of the appeal process and resultant fines.

13.289 *Caerphilly CBC, POSW South East Wales, Torfaen CBC:* (1) and (3) No – this would make the enforcement appeal process very burdensome in itself and on all the parties involved including the inspector. The list is prepared by Cadw, each building included following a careful consideration of it architectural or historic importance. If its status could be questioned at an appeal, the appellant and the LPA would have to produce evidence, and the inspectors would have to put themselves in Cadw's shoes and decide whether the listing was appropriate. It would be better to keep this as a separate process. (2) and (4) are acceptable since the building will not have been formally listed, and Cadw may wish to attend any hearing to make a case for listing.

13.290 *Llandaff Conservation Area Advisory Group:* No, we do not consider that consideration of an appeal on a listed building is an appropriate stage at which to consider de-listing. We consider that this provision should be repealed. An unintended consequence of this provision could be that some owners might let a listed building deteriorate, apply for demolition and precipitate an appeal as a cynical way of triggering re-assessment of a listed building's heritage value.

13.291 *Newport City Council:* No introduces uncertainty about the longer term status of a listed building.

13.292 *Bridgend CBC:* 1) No – an appeal is not the appropriate procedure to attempt to delist a building. 2) Yes. 3) No. 4) Yes. The proposal is unnecessary and is likely to encourage an increase in the number of unnecessary appeals and will cause delays. A review of the statutory list should be dealt with separately if efficiencies are paramount and complexity is to be avoided.

13.293 *PEBA*: PEBA has concerns about the proposal to make it a ground of appeal that the building ought to be removed from the List altogether. The concern is that this ground of appeal would result in many more challenges to the Listing Status than is objectively warranted. Moreover, the proposal may be especially problematic in cases of demolition, where it has become impossible to see and assess the significance of the asset, a factor that could provide an incentive to demolish first and challenge the list afterwards. There is a method of challenging listing/delisting and it appears to be working well. Any challenge to a decision not to de-list is vulnerable to potential judicial review.

CONSULTATION QUESTION 13-6.

We provisionally propose that the Bill should include provisions to the effect that:

(1) **the carrying out without planning permission (or in breach of a condition or limitation attached to permission) of heritage development – defined along the lines indicated in Consultation question 13-1 – be a criminal offence, punishable**

- **on summary conviction by imprisonment for a term not exceeding six months or a fine or both; or**

- **on [conviction on indictment[1]] by imprisonment for a term not exceeding two years or a fine or both; and**

(2) **the defence to a charge of such an offence is the same as currently applies in relation to a charge of carrying out works without listed building consent.**

Do consultees agree?

[1] Not "summary conviction", as in the Consultation Paper.

Number of responses

13.294 Total: 39 (19 in agreement, 13 equivocal responses and 7 in disagreement).

Response strongly in agreement

13.295 *Chartered Institute of Architectural Technologists:* We strongly agree that unauthorised works and demolition to listed buildings should remain a criminal offence.

Responses in agreement (without further comment)

13.296 ICE Wales, CLA, Merthyr Tudfil CBC, Historic Houses Association, Llandaff Conservation Area Advisory Group, Monmouth Town Council, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Canal & River Trust, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government, Keith Bush, PEBA, Huw Williams (Geldards)

13.297 Responses in agreement (with additional comment)

13.298 *Nigel Hewitson:* I agree with the proposals regarding criminal offences relating to carrying out heritage development without planning permission, which simply preserves the status quo.

13.299 *Theatres Trust:* The Trust agrees with this proposal, as appropriate punishments must be in place to deter unauthorised heritage development.

13.300 *Rhondda Cynon Taf CBC*: Agree – the potential for harm to listed structures needs and requires the deterrence that comes with it being a criminal offence.

Equivocal responses on the basis of opposition to 13-1

13.301 *Society for the Protection of Ancient Buildings:* Yes, should the reforms be implemented, though of course this would only be necessary due to the amalgamation of the consents.

13.302 *Blaenau Gwent CBC:* Notwithstanding the earlier objection to a common application process, agree.

13.303 *Peter Thomas:* Notwithstanding the significant concerns raised at 13-1, if the concept of 'Heritage Development' were agreed this provision seems logical.

13.304 *Mid and West Wales Conservation Officers Group, Bridgend CBC:* If we did accept the concept of Heritage Development then these provisions (1-4) should be carried over into the new legislation. However, our position on 13-1 stands.

13.305 *Chartered Institute for Archaeologists:* If there is to be unification of consents as proposed, yes, although, if anything, we would like to see greater penalties available and utilised in practice.

13.306 *Central Association of Agricultural Valuers:* Whilst we understand that criminal sanctions are being used to reflect that fact that damage to a heritage building may

not be reversible and therefore should be strongly deterred, we think the use of fines would be more appropriate.

13.307 *Institute of Historic Building Conservation:* The provisions to criminalise breaches of planning permission are a response to concerns raised in the Institute's response to the consultation on the Scoping Paper in stating we would be strongly opposed to any move to decriminalise breaches relating to Listed Buildings. Currently breach of Listed Building Consent is a criminal offence and this does not apply to Planning Permission. We would strongly oppose any move to de-criminalise breaches relating to Listed Buildings. Whilst we do not support the unification of consents as a principle we are pleased to see that this matter has been considered as part of the proposal as it is essential that unauthorised work to Listed Buildings continues to be a criminal offence.

13.308 *The Law Society:* Ensuring that the provisions currently available when dealing with listed buildings being replicated to any combined consent are welcomed. We would, however, note that the concerns highlighted above – that of the perceived primacy of planning permission, could undermine the current situation with regards to the approach to listed buildings.

13.309 *Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC:* Notwithstanding our concerns as to the principle of a unified consent, there is apparent merit in criminalizing the carrying out without planning permission (or in breach of a condition) of 'heritage development'. However, it is easy to criminalize and far less easy to initiate proceedings. Such a blanket approach raises the potential for undertaking a multitude of prosecutions, including aspects of 'heritage development not strictly relating to listed buildings. This is inflexible, with inevitable costs and delays accruing to both planning authority and applicant. The separation of regimes would be more flexible to applicants whereby prosecution may be undertaken with regards to specific listed building issues, allowing other works subject to planning permission to continue – or enforcing a planning breach whilst allowing other listed building works to continue. Prosecution under a single consent is likely to delay or stop schemes with 'heritage' seen as an unwelcome barrier to sustainable development – which seems the antithesis of the current consultation. Therefore, we do not agree with the proposal.

13.310 *Pembrokeshire CC:* See 13-2 above.

Responses disagreeing (without further comment)

13.311 *Barry Town Council:* Disagree.

Responses disagreeing (with further comment)

13.312 *Ceredigion CC:* CCC does not agree. This will offer an element of protection, but no more than already exists under the current system. The separation of regimes would be more flexible to applicants whereby prosecution may be undertaken with regards to specific listed building issues, allowing other works subject to planning permission to continue – or enforcing a planning breach whilst allowing other listed building works to continue. Prosecution under a single consent is likely to delay or stop schemes,

with ‘heritage’ seen as an unwelcome barrier to sustainable development – which seems the antithesis of the current consultation.

13.313 *Allan Archer:* As a consequence of my views on 13.1, I do not support this proposal as it relates to LBC works but agree in relation to CAC demolition.

13.314 *Caerphilly CBC and POSW South East Wales:* This would not be necessary if the two regimes are not unified.

13.315 *Monmouthshire CC:* We do not agree, please see the reasons identified in point 1.

13.316 *Cardiff Council*: No, because we do not agree with the proposal to redefine listed building consent as heritage development. These changes would replicate existing provisions and would not be required if consents are not merged.

CONSULTATION QUESTION 13-7.

We provisionally propose that the Bill should include provisions to the effect that heritage development be excluded from the categories of development that are subject to time limits as to the period within which enforcement action may be taken. Do consultees agree?

Number of responses

13.317 Total: 39 (25 in agreement, 11 equivocal responses and 3 in disagreement).

Responses in agreement (without further comment)

13.318 ICE Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Llandaff Conservation Area Advisory Group, Monmouth Town Council, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Canal & River Trust, Lawyers in Local Government, Keith Bush, Andrew Ferguson, PEBA

Responses in agreement (with additional comment)

13.319 *PINS:* Agreed that heritage development should be excluded from the categories of development that are subject to time limits as to the period in which enforcement action may be taken.

13.320 *Pembrokeshire Coast NPA, National Parks Wales, Ceredigion CC:* agree that the Bill should exclude provisions to the effect that ‘heritage development’ be excluded from the categories of development that are subject to time limits as to enforcement.[2] Original features could be removed within a Listed Building and only come to light many years later. If these offences are time barred then the only way of preventing unauthorised works would be by regular inspections on all Listed Properties.

[2] This is the sense of the response.

13.321 *The Law Society & Huw Williams (Geldards):* We agree. Drafting should be explicit that heritage development cannot become immune through effluxion of time.

13.322 *Institute of Historic Building Conservation:* Again this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support. Whilst we do not support the unification of consents as a principle we are pleased to see that this matter has been considered and there is no time limit proposed on enforcement action for heritage development.

13.323 *Chartered Institute for Archaeologists:* If there is to be unification of consents as proposed, and subject to the concerns expressed above as to the use of the term 'heritage development', yes.

13.324 *Mid and West Wales Conservation Officers Group:* If we did accept the concept of Heritage Development then these provisions (1-4) should be carried over into the new legislation. However, our position on 13-1 stands.

13.325 *Rhondda Cynon Taf CBC*: Agree – the capacity to remediate harm should always be available to the LPA and not be time limited.

Equivocal responses

13.326 *Society for the Protection of Ancient Buildings:* Yes, should the reforms be implemented and subject to our concerns relating to the definition of 'heritage development' as expressed above. Again we note this would only be necessary due to the amalgamation as there is no time limit at present.

13.327 *Carmarthenshire CC, Bridgend CBC:* If the concept of 'Heritage Development' is to be taken forward then this provision should be carried over into the new legislation. However, our position on 13-1 stands.

13.328 *Theatres Trust:* The Trust agrees with this proposal. If Ministers are minded to merge planning permission and listed building consent, this proposal is essential to deter persons from undertaking unauthorised works. However, the fact that such provision would be needed is further argument in support of our objection to maintaining listed building consent as a separate application type.

13.329 *Peter Thomas:* Notwithstanding the significant concerns raised at 13-1, if the concept of 'Heritage Development' were agreed this provision seems logical.

13.330 *Pembrokeshire CC:* See 13-2 above.

Equivocal responses on the basis of opposition to 13-1

13.331 *Allan Archer:* As a consequence of my views on 13.1, I do not support this proposal as it relates to LBC works but agree in relation to CAC demolition.

13.332 *Caerphilly CBC and POSW South East Wales:* This would not be necessary if the two regimes are not unified.

13.333 *Monmouthshire CC:* We do not agree, please see the reasons identified in point 1.

13.334 *Cardiff Council*: No, because we do not agree with the proposal to redefine listed building consent as heritage development. These changes would replicate existing provisions and would not be required if consents are not merged.

Other responses disagreeing (with additional comment)

13.335 *Nigel Hewitson:* I disagree with the suggestion that there should continue to be no time limit on enforcement relating to the carrying out of heritage development without planning permission. From a legal perspective I think the lack of a time limit is problematic in relation to Article 6 of the European Convention on Human Rights which provides a right to a fair trial within a reasonable time of matters concerning an individual's civil liberties. (I am sure I don't need to point out that the European Convention is separate from the EU and the UK leaving the EU will not affect Article 6's direct applicability in English and Welsh law.)

More importantly, from a practical point of view, as things stand, the purchaser of any listed building is in the invidious position of potentially receiving an enforcement notice for works he didn't carry out and knew nothing about. The works may have been carried out many years ago by an owner prior to the seller and about which the seller has no knowledge. In that situation the seller can, in answer to pre-contract enquiries, honestly say he is not aware of any works having been carried out without consent meaning that the buyer has no cause of action for misrepresentation either. I would favour there being a time limit - perhaps the longer limit of 10 years – to make it less likely that innocent buyers end up on the receiving end of an enforcement notice with no redress against their seller. I cannot support the position where there is no time limit.

13.336 *Central Association of Agricultural Valuers:* We do not believe enforcement action should be open ended. An open ended period may cause issues, for example where the property has been sold and enforcement action is taken against an owner who did not carry out the objectionable works. The use of property requires certainty and liability to enforcement should not be left open-ended for decades.

13.337 *Historic Houses Association:* We are unsure about this proposal. The potential implications need to be thought through more carefully. A new owner may take on a property, discover unauthorised works and then be liable for enforcement action, in relation to the criminal offence outlined in 13-6. Having no expiry date could mean new owners are faced with a substantial bill, fine or indeed prison sentence for an offence carried out by someone else, possibly generations ago.

CONSULTATION QUESTION 13-8.

We provisionally propose that the Bill should include provisions to the effect that:

(1) **where an enforcement notice is issued in relation to the carrying out of heritage development in breach of planning control, the grounds on which an appeal may be made against such a notice include grounds equivalent to grounds (a), (d), (i), (j) and (k) as set out in Section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990;**

(2) **the Welsh Ministers, in determining an enforcement appeal relating to a listed building, may exercise their powers to remove the building from the list.**

(3) **in determining an enforcement appeal relating to a building subject to a building preservation order, they may exercise their powers not to include it in the list.**

Do consultees agree?

Number of responses

13.338 Total: 37 (19 in agreement, 9 equivocal responses, and 9 in disagreement).

Responses in agreement (without further comment)

13.339 Nigel Hewitson, ICE Wales, CLA, Merthyr Tudfil CBC, PINS, Chartered Institute for Archaeologists, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Canal & River Trust, Keith Bush, PEBA, Huw Williams (Geldards)

Responses in agreement (with additional comment)

13.340 *The Law Society:* Ensuring that the provisions currently available when dealing with listed building enforcement appeals being replicated to any combined consent would be welcomed.

13.341 *Lawyers in Local Government:* Yes, but removal of listing on an appeal should not mean that taking the enforcement action was of itself unreasonable conduct leading to an award of costs against the LPA.

13.342 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services:* Yes, but removal of listing on an appeal should not mean that taking the enforcement action was of itself unreasonable conduct leading to an award of costs against the LPA.

13.343 *Theatres Trust:* Further to our responses to questions 13.5 and 13.6, in principle we agree with this proposal but we would seek reassurance that any decision to remove a building from the list is to be based on its qualities prior to works having taken place and must not be influenced by unauthorised modifications.

13.344 *Central Association of Agricultural Valuers:* We broadly agree but, however, do not understand why some grounds under the 1990 Act have not been included. We believe it should be possible to argue any reasonable ground.

13.345 *Rhondda Cynon Taf CBC*: Agree – bringing all three provisions across into any new legislation would be necessary.

Equivocal responses on the basis of opposition to proposal 13-1

13.346 *Institute of Historic Building Conservation:* Again this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have

expressed opinion above and do not support. Whilst we do not support the unification of consents as a principle this proposal sits suitably within that context.

13.347 *South Wales Conservation Group:* If we did accept the concept of Heritage Development then this provision should be carried over into the new legislation. However, our position on 13-1 stands.

13.348 *Mid and West Wales Conservation Officers Group:* If we did accept the concept of Heritage Development then these provisions (1-4) should be carried over into the new legislation. However, our position on 13-1 stands.

13.349 *Bridgend CBC:* 1) Yes. 2) No. 3) Yes. If the Heritage Development proposals are implemented, then these provisions (apart from 2) should be carried over into the new legislation. However, the position on 13-1 stands.

13.350 *Peter Thomas:* Notwithstanding the significant concerns raised at 13-1, if the concept of 'Heritage Development' were agreed this provision seems logical.

13.351 *Pembrokeshire CC:* See 13-2 above.

13.352 *Blaenau Gwent CBC:* See answer to 13-5. This demonstrates the intricacies and complexities of a conjoined system.

13.353 *Historic Houses Association:* We believe the Historic Environment (Wales) Act 2016 made significant changes to the enforcement procedure, and consequently we suggest the addition to 13-8 paragraph 1 of the following sentence "and equivalent paragraphs in the Historic Environment (Wales) Act 2016".

Responses disagreeing, on the basis of opposition to proposal 13-1/2

13.354 *Allan Archer:* As a consequence of my views on 13.1, I do not support this proposal.

13.355 *Society for the Protection of Ancient Buildings:* No, as we strongly disagree with the merging of consents.

13.356 *Monmouthshire CC:* We do not agree, please see the reasons identified in point 1.

13.357 *Cardiff Council*: No, because we do not agree with the proposal to redefine listed building consent as heritage development. These changes would replicate existing provisions and would not be required if consents are not merged.

Other responses disagreeing (with additional comment)

13.358 *Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, and Ceredigion CC:* We disagree. During the determination of an enforcement appeal, there is potentially a fine line between a building being deemed as not being of architectural or historic importance as listed, or such as subsequently despoiled, prior to removal from the statutory list. As set out in 13-5 above, the latter scenario invites the opportunity for a well-informed and unscrupulous developer to do their worst. In the context of a building subject to a building preservation order, we have no comment.

13.359 *Llandaff Conservation Area Advisory Group:* No, we do not consider that consideration of an enforcement appeal on a listed building is an appropriate stage at which to consider de-listing. An unintended consequence of this provision could be that some owners might let a listed building deteriorate and undertake work on it without consent as a cynical way of triggering re-assessment of the building's heritage value. We consider that the preparation of this new Planning Code is an appropriate time to re-consider policy on this matter and reinforce the importance of preserving the integrity of the stock of listed buildings in Wales.

CONSULTATION QUESTION 13-9.

We provisionally consider that planning permission should not be unified with scheduled monument consent. Do consultees agree?

Number of responses

13.360 Total: 44 (39 in agreement, 1 equivocal response, 3 in disagreement, and 1 other).

Responses in agreement (without further comment)

13.361 Dyfed Archaeological Trust, Gwynedd Archaeological Trust, ICE Wales, Allan Archer, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Historic Houses Association, Monmouth Town Council, Pembrokeshire CC, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Canal & River Trust, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council

Responses in agreement (with additional comment)

13.362 *Nigel Hewitson:* I agree that scheduled monument consent should not be unified with the other consents. Applications are so small in number that they should continue to be dealt with at central government rather than local authority level. The small number of cases means that it is unlikely to be economic for each local authority to retain the appropriate level of expertise in such matters.

13.363 *Pembrokeshire Coast NPA, National Parks Wales:* We agree that planning permission should not be unified with scheduled ancient monument consent (due to the fact that this regime comes under the Welsh Ministers). However, the additional reasoning that scheduled ancient monuments are rare and therefore need specialist expertise from Cadw may equally be applied to listed buildings! The proposal to replace the listed building consent regime and the consequent diminution of the role of the building conservation officer stands in stark contrast to proposal 13-9. There are 30,000 listed buildings in Wales and 4000 scheduled ancient monuments. Pro rata, listed buildings are no less rare than scheduled ancient monuments – and generally rather more apparent to the public in that most are in everyday use, part of the landscape and streetscape. Unlike scheduled ancient monuments, listed building owners have the statutory duty to keep them in safe repair and planning authorities the statutory power to enforce such. Unlike the majority of scheduled ancient monuments, listed buildings tend to be in constant need of upkeep and works to

ensure that they remain viable. Therefore, do they not deserve at least equally specialist treatment than scheduled ancient monuments?

13.364 *Caerphilly CBC, POSW South East Wales:* This would not be necessary if the two regimes are not unified. Proposals 13-6/7/8 illustrate the somersaults the legislation would have to make in order to separate the two regimes having brought them together. The current separate systems work well, and do not need to be amended.

13.365 *Society for the Protection of Ancient Buildings:* Yes, should the reforms be implemented. However, we feel the review misses an opportunity in not proposing to widen the consultation arrangements for scheduled monument consent. At present there is no duty to notify national amenity societies of consents relating to scheduled monuments under the existing 1979 Act. This is an oddity given the requirement under the Planning (Listed Building & Conservation Areas Act) 1990 that LPAs notify the national amenity societies of equivalent works to listed buildings. In addition, where planning permission is also sought for works to a scheduled monument there is no requirement for the NAS to be notified, and yet under requirements pertaining to planning applications, the wider public are.

Yet further obfuscation exists where, through historical errors in designation, a monument is both scheduled and listed – LPAs and applicants are rightly unsure what consent is required, and therefore who to consult. This is perhaps a matter that can be reversed over time by rationalising existing designations and advising owners and LPAs of their duties under such a circumstance, but we include it here to show that there are issues relating to the accessibility and transparency of the scheduled monument consent system that this review has not sought to rectify despite it being a stated aim of the exercise.

To open up the SMC process to wider consultation would add value to the decision-making process and increase the protection afforded to scheduled monuments. To that end we would welcome an amendment to Part I of the Ancient Monuments and Archaeological Areas Act 1979 that directs that the national amenity societies should be notified of works for demolition or alteration of scheduled monuments in Wales.

13.366 *CLA:* Yes. This is not only because of the issues set out in 13.181-185, but because the issues in the decision process are very different. A single 'heritage asset consent' approach might encourage decision approaches focused on the 'preservation' of 'evidence/historic fabric' which might be appropriate for scheduled monuments but could be very damaging to listed buildings with their high maintenance costs and their need for sympathetic change so that they can be kept usable and viable in order to survive in the long term.

13.367 *Association of Local Government: Archaeological Officers:* ALGAO:Cymru agrees that planning permission should not be unified with scheduled monument consent (SMC). The presumption in favour of sustainable development within the planning process is at fundamental odds with the SMC process which maintains a presumption against any proposals which might harm the significance of a scheduled monument.

13.368 *South Wales Conservation Group:* As Scheduled Ancient Monument Consents and Listed Building consents are not determined by the same authorities, these cannot be unified. We would obviously therefore agree with this! Listed Buildings are more

prolific, and arguably require more upkeep and works than SAMs. Listed Buildings should be given equal status to that of a SAM in the context of these proposals.

13.369 *Carmarthenshire County Council:* We agree that planning permission should not be unified with scheduled ancient monument consent (due to the fact that this regime comes under the Welsh Ministers).

13.370 *Ceredigion County Council:* Agreed. Noted that the additional reasoning that scheduled ancient monuments are rare and therefore need specialist expertise from CADW may equally be applied to listed buildings.

13.371 *Llandaff Conservation Area Advisory Group:* Yes, we consider it important to retain the very special protection afforded to scheduled ancient monuments (SAMs) - we have several within Llandaff Conservation Area - however we regret that Cadw's budgetary constraints severely limit the scope for their preservation.

13.372 *Theatres Trust:* The Trust agrees that these two application types should not be unified, and as the rationale for maintaining their separation is also applicable to planning permission and listed building consent/conservation area consent we would reiterate our objection to them being merged.

13.373 *Chartered Institute for Archaeologists:* Yes. However, as explained above the issues relating to the consideration of historic assets with archaeological interest (both designated and undesignated) should be addressed in the review.

13.374 *Peter Thomas:* Agree but why not? Why are scheduled monuments so special they are to be exempted but listed buildings are not? They both require specialist expertise, often with significant overlap. Often there are fine lines between scheduling and listing with many buildings 'benefiting' from both. A question that perhaps should be asked is should there be a review of historic assets across Wales to definitely sort listed building and scheduled monuments?

13.375 *Monmouthshire County Council:* In practical terms as the consenting regime is issued by different bodies the merging of the two processes would logistically be very difficult. Given the number of applications, much like the low number of combined LBC and PP applications, the impact of the change outweighs the benefit. It is noted that there may be confusion that a significant part of heritage is not combined under the heading of Heritage Development.

13.376 *The Law Society:* For practical reasons relating to the national expertise provided by CADW and their rarity, applications for scheduled monument consent should be retained and should continue to be made to the Ministers.

It may be possible to reflect further on the determination of scheduled monument consent and whether it would be possible to bring it more in line with the determination of planning permission, listed building consent and conservation area consent so that this can be reviewed again in the future.

The proposal to replace the listed building consent regime and the consequent diminution of the role of the building conservation officer stands in stark contrast to proposal 13.9. There are 30,000 listed buildings in Wales and 4,000 scheduled

ancient monuments. Pro rata, listed buildings are no less rare than scheduled ancient monuments – and generally rather more apparent to the public in that most are in everyday use, part of the landscape and streetscape. Unlike scheduled ancient monuments, listed building owners have the statutory duty to keep them in safe repair and planning authorities the statutory power to enforce such. Unlike the majority of scheduled ancient monuments, listed buildings tend to be in constant need of upkeep and works to ensure that they remain viable. Therefore, do they not deserve at least equally specialist treatment to scheduled ancient monuments.

13.377 *Bridgend CBC, Mid and West Wales Conservation Officers Group:* Yes - As Scheduled Ancient Monument Consents and Listed Building consents are not determined by the same authorities, these cannot be unified. There are greater numbers of Listed Buildings than Scheduled Ancient Monuments, and arguably, they require more upkeep and works. Listed Buildings should be given equal status to that of a SAM in the context of these proposals.

13.378 *Huw Williams (Geldards)*: I agree that for practical reasons relating to the national expertise provided by CADW and their rarity, applications for scheduled monument consent should be retained and should continue to be made to the Ministers.

13.379 *Rhondda Cynon Taf CBC*: Agree – the proposed changes should only extend as far as unifying planning permission with LBC and CAC, with SMC remaining under the Ministers. Where a building or structure is both listed and a SAM then the consent for both regimes should be delivered through the SMC as the senior legislation as at present.

Equivocal responses

13.380 *Institute of Historic Building Conservation:* Again this is predicated on acceptance of the proposed unification of Listed Building Consent, Conservation Area Consent and Planning Permission (Option (4) of the possible reforms) about which we have expressed opinion above and do not support. The proposal not to include Monuments as part of "heritage/heritage development" seems at odds with the rest of the proposals. If Listed Building Consent were to be subsumed into a wider consent regime, then surely Scheduled Monument Consent must also be too. The proposal would divorce aspects of the system of Historic Environment management from others. Indeed, there may be public value in merging SMC and LBC processes under a unified Heritage Consent regime covering all forms of heritage development. This would also ensure a unified regime is applied to dealing with unscheduled archaeology and also Scheduled Monuments that comprise built, above ground heritage. This could possibly be framed in a way to address the issue of undesignated heritage assets, which under the current regime in England are sometimes almost treated as if they were listed. This is pertinent to the state of the current heritage lists, which in some areas are inadequate and far from comprehensive and up-to-date.

Other responses disagreeing (with additional comment)

13.381 *PINS:* PINS see no reason why Scheduled ancient monuments consent should not be unified with planning permission, provide that the specialist expertise are provided by the relevant bodies, such as Cadw or the regional archaeological trusts. This arrangement would work much in the same way as those applications for listed

building consent being dealt with by LPA's which do not have in-house conservation expertise or which are dealing with applications in relation to Grade II* or Grade I Listed Buildings. It does not therefore seem unreasonable that is should not fall to be considered as part of the same consenting regime as other heritage assets.

13.382 *Glamorgan Gwent Archaeological Trust:* Exclusion of Scheduled Monument Consent: We understand the arguments for separation, but the processes of SMC and planning consent clearly need to run closely where SMC is required for development. SMC consultation is slow by comparison with that in the planning process.

13.383 *Mineral Products Association:* we consider that the schedule monument consent process should be included within the planning permission. Consultation on any proposed development which does affect and SM is part and parcel of the consenting process and there is no reason why the proposed approach for listed buildings and conservation areas could not stretch to include SMCs.

Other comments

13.384 *Central Association of Agricultural Valuers:* We believe that planning authorities should have a duty to alert applicants to the need to apply for scheduled monument consent where appropriate.

CONSULTATION QUESTION 13-10.

We provisionally consider that the definition of "listed building" should be clarified by making it clear that the definition includes pre-1948 objects and structures if they were within the curtilage of the building in the list, as it was:

(1) in the case of a building listed prior to 1 January 1969, at that date; and

(2) in any other case, at the date on which the building was first included in the list.

Do consultees agree?

Number of responses

13.385 Total: 34 (32 in agreement, and 2 in disagreement).

Responses strongly in agreement

13.386 *The Law Society*: The issue around curtilage listed buildings is difficult and an opportunity to clarify this is welcomed.

Responses in agreement (without further comment)

13.387 Nigel Hewitson, ICE Wales, Allan Archer, Caerphilly CBC and POSW South East Wales, Society for the Protection of Ancient Buildings, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys

Mon Council Legal Services, Llandaff Conservation Area Advisory Group, Monmouth Town Council, Pembrokeshire CC, PINS, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Canal & River Trust, Lawyers in Local Government, Keith Bush

Responses in agreement (with additional comment)

13.388 *Pembrokeshire Coast NPA, National Parks Wales:* We agree with the proposal to clarify the legal definition of a listed building to make reference to curtilage objects and structures. This may be done in isolation of the proposal to merge consents however – the subject has been frequently aired among professionals over the years.

13.389 *South Wales Conservation Group, Carmarthenshire CC, Bridgend CBC:* Agree it would be welcomed if the legislation defined curtilage, particularly due to the anomaly that listed buildings built after 1948 formally have no curtilage structures listed. We would support this approach independently of this review.

13.390 *Mid and West Wales Conservation Officers Group:* We agree with the proposal to clarify the legal definition of a listed building to make reference to curtilage objects and structures, particularly due to the anomaly that buildings listed built after 1948 formally have no curtilage structures listed. In fact, we would be in support of all case law being brought into the primary legislation. This may be done in isolation of the proposal to merge consents however – the subject has been frequently aired among professionals over the years. Would support this approach independently of this review.

13.391 *Chartered Institute for Archaeologists:* Yes. We would also consider that the concept of curtilage for a heritage asset should be more clearly defined that it is at present as commented below (see paragraph 18.6.1).

13.392 *Peter Thomas:* The legislative definition is fine BUT significantly more useful would be the identification of the curtilage and associated structures at the time of listing. This should be a duty placed on the Welsh Ministers when adding a building to the list.

13.393 *Monmouthshire CC:* A legal definition of curtilage in relation to listed buildings would be welcomed and would be supported regardless of the other changes proposed. Additional guidance would be preferable to clarify some of the core tests.

13.394 *Cardiff Council*: Agree, although this would not appear to address the anomaly that the listings for buildings built after 1948 cannot extend to curtilage structures.

13.395 *Rhondda Cynon Taf CBC*: Agree – the proposed changes would bring welcome clarification and reduce the potential for litigation.

Responses disagreeing (with additional comment)

13.396 *Institute of Historic Building Conservation:* This could lead to confusion as it is the Institute's understanding that from 1969 the new definition of listed building came into force and applied to all listed buildings whenever they were listed. Otherwise surely the legislation would have made clear that two definitions applied dependent on circumstances. This proposed change could be interpreted to suggest that curtilage

does not apply to buildings listed before 1969, however there is no case law as far as we are aware to support this, there has not been any legal interpretation specifically determining this point nor is there any relevant precedent to be followed. It is however accepted that any work carried out to curtilage structures or buildings prior to 1 January 1969 would not be unauthorised as the provisions of the change would not act retrospectively.

13.397 *Historic Houses Association:* See our comments on Q18-16. Ultimately, if objects and structures are of historic importance they should be listed in their own right; if they are not of their own historic importance, but do contribute to the experience of the main listed building, then they should be protected as part of a place's setting rather than curtilage.

CONSULTATION QUESTION 13-11.

We provisionally propose that the Ancient Monuments and Archaeological Areas Act 1979 should be amended so that Part 2 (areas of archaeological interest) does not apply in Wales. Do consultees agree?

Number of responses

13.398 Total: 40 (35 in agreement, 2 equivocal responses, and 3 in disagreement).

Responses in agreement (without further comment)

13.399 PINS, Pembrokeshire CC, ICE Wales, Caerphilly CBC and POSW South East Wales, Merthyr Tudfil CBC, Barratt & David Wilson Homes South Wales, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Historic Houses Association, Home Builders Federation, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Bridgend CBC, Canal & River Trust, Lawyers in Local Government, Keith Bush, CLA, PEBA

Responses in agreement (with additional comment)

13.400 *Dyfed Archaeological Trust:* We agree. As this particular element of legislation has not been used in almost 40 years it would be sensible to amend legislation so that it does not apply in Wales.

13.401 *Gwynedd Archaeological Trust:* We agree that Part 2 of the Ancient Monuments and Archaeological Areas Act 1979 need not apply in Wales, as this part of the Act has not been, and is unlikely to be, used within Wales.

13.402 *Association of Local Government: Archaeological Officers:* ALGAO:Cymru concurs that Part 2 of the Ancient Monuments and Archaeological Areas Act 1979 is not currently applicable to Wales and that there is limited value in utilising such areas (as set out in the AMAA Act 1979) in Wales in the future.

13.403 *Nigel Hewitson:* I agree that areas of archaeological interest should be abolished. As the paper correctly points out none have ever been designated in Wales and thus the provisions in the 1979 Act serve no useful purpose in Wales.

13.404 *Pembrokeshire Coast NPA, National Parks Wales:* We were of the view that planning authorities such as Cardiff and Newport Gwent have identified and defined areas of archaeological significance in their local area and have included them in their policies. Certainly this is the case in some English Authorities, such as the Isle of Wight. Given the increasing public interest in archaeology, our view is that the designation of an area of archaeological interest should remain as an appropriate constraint.

13.405 *Allan Archer:* Given the contextual information in the report, I agree the provisions of Part 2 do not need to be applied in Wales

13.406 *Llandaff Conservation Area Advisory Group:* Yes, provided that a signpost highlights the policy mechanisms in TAN 24 which have the same effect.

13.407 *Pembrey and Burry Port Town Council:* The Committee felt that abolishment of the power to designate areas of archaeological importance was fine, provided that there was still the power to protect archaeologically important areas by other means.

13.408 *Society of Antiquaries of London:* In relation to the Question 13-11, the proposal to abolish the power to designate Areas of Archaeological Importance (AAIs) and the associated procedures occasioned considerable discussion. The key positions pro and con are:

1. If the power had practically never been used, and there is no prospect of it being employed, it might as well be abandoned;

2. There is, however, evidence that the English cities where AAIs had been designated had found this of real value and effect. Designation helps prevent important archaeological sites from being damaged or destroyed without at least allowing for some investigation and recording first, where the works are concerned are not 'development' under S55(2) of the 1990 Town and Country Planning Act, and so outwith the scope of archaeological planning policies, notably excavations for utility services, such as water and gas pipes in streets.

Furthermore, the unauthorised use of a metal detector in archaeological areas is an offence.

This does not amount to a recommendation that the power should be kept, but we would nonetheless advise the Minister to consider whether some Welsh equivalent of AAI status would not be desirable in place of simple abolition of the designation and its objectives.

13.409 *National Grid:* Areas of Archaeological Importance (AAIs) raise an interesting question. The five city centres of Canterbury, Chester, Exeter, Hereford and York were designated in 1984, and Historic England has indicated that there is no intention to use such powers again. In that context, the proposal to abolish the power in Wales makes sense. The protection afforded to historic town centres does seem to be appreciated by these five designated areas, and leads to the question about whether there are similarly historic cities/towns in Wales, and whether an AAI designation would help the planning authority and Cadw. Even if that is the case, the need for

continued AAI designation powers is unlikely, and the long term removal of the power to designate makes common sense.

13.410 *The Law Society:* We agree that this protection regime is now redundant. However, we wonder whether this should be taken forward at this time as it may be best to wait until there can be a more comprehensive approach to scheduled monuments, and other provisions in this legislation.

13.411 *Institute of Historic Building Conservation:* No strong views are held on this proposal. If there have been no areas of archaeological interest designated in Wales as suggested the provisions in the 1979 Act have no relevance or use.

13.412 *Huw Williams (Geldards)*: Agree, this protection regime is now redundant.

13.413 *Rhondda Cynon Taf CBC:* Agree – (we have managed without it for nearly 40 years in reality).

Equivocal responses

13.414 *Monmouth Town Council:* The Committee has local concerns. Monmouth is fortunate to have a wealth of potential archaeological interest as well as that already known. Moreover, we have invaluable unique local expertise. Can we be assured that TAN 24 is sufficient to ensure that archaeological investigation is part of the planning permission process?

13.415 *Redwick Community Council*: The Councillors are concerned to note the contents of the final sub-heading of this Chapter — Areas of archaeological importance — and in particular paragraph 13.193. While they broadly support the overall aim of unifying the consent regimes discussed throughout this Chapter they are concerned that there appears to be a risk of diminishing the importance of the context of conservation areas in the wider landscapes around them and, especially, of the landscapes themselves. They noted that some of the responses to the Scoping Paper in this Chapter expressed this reservation (albeit mostly in reference to the impact on listed buildings and such designated heritage assets) —see for example 13.67. Other responses appeared to ascribe some of their concerns to the lack of specialist expertise in the planning departments when faced with development proposals in these wider landscape areas – see for example 13.81.

This matter is of immediate interest to the local, community who have suffered from the visual Impact of a local development (a substantial wind turbine) which has introduced a highly visible and moving structure in this open landscape. This development was passed by the Local Authority Planning Committee who had advice to the contrary from CADW, among other statutory consultees, and in the face of a very strong objection from the community. The Community Council are particularly concerned that there Is now a greater possibility of further cumulative impacts on the landscape from such developments being permitted on the basis that one such has already been permitted.

Responses disagreeing (with additional comment)

13.416 *Society for the Protection of Ancient Buildings:* No. Part 2 of the Ancient Monuments and Archaeological Areas Act 1979 makes provision for the designation of Archaeological Areas. This mechanism for designation of important archaeological sites as they are discovered helps to prevent buried assets from being damaged or destroyed without first being investigated and recorded. Whilst we take the point in 13.192 that no such areas have been designated in Wales and that use of this mechanism has been limited in England, the proposal to remove the opportunity to designate such areas in Wales is contrary to the aim that any reform of the consent regime 'must maintain at least the current level of protections' and no convincing argument has been made that it impedes the current framework.

13.417 *Glamorgan Gwent Archaeological Trust:* Amendment to AM&AA Act 1979 Part 2: We do not agree to the proposal. That Part 2 of the Ancient Monuments and Archaeological Areas Act 1979 has not been implemented in Wales may be more to do with an administrative reluctance to use it rather than that it is not inherently useful or practicable. Given other impending and unknown legislative changes as a consequence of leaving the European Union it would be imprudent to reduce the historic environment protection tool-kit at this time.

13.418 *Chartered Institute for Archaeologists:* No. We accept that this designation has not thus far been used in Wales and its provisions were drafted at a time when developer-funding was not the norm. However, we endorse the comment of the Planning Officers Society Wales (South East) that 'before deleting what appear to be obsolete areas of existing legislation, it might be worth asking whether they could be one day be revived to good purpose.' Other mechanisms which might be revisited to provide further protection for the historic environment (and in particular for undesignated historic assets) include 'sites of archaeological importance' as defined in the General Permitted Development Order.

13.419 *Council for British Archaeology Wales:* Part II of the Ancient Monuments and Archaeological Areas Act 1979 makes provision for the establishment of Archaeological Areas. Designation helps to prevent important archaeological sites from being damaged or destroyed without at least allowing for some investigation and recording first. Critically, the regime applies to all works that disturb the ground and so allows for some investigation of sites proposed to be dug for utility services, such as water and gas pipes, which otherwise do not need planning permission. Five areas have been designated in England but none in Wales. The proposal is to remove the opportunity to designate such areas in Wales. CBA Wales is particularly concerned about this proposal as although it is infrequently used, previously unknown archaeological sites are being discovered all the time. Without recourse to such a designation, important archaeological material might be lost through infrastructure works which do not require planning permission. If the Welsh proposals were later extended to England then some of our most important heritage cities (York, Chester, Exeter, Hereford and Canterbury) could be affected. In addition, we do not consider this meets the requirements of the review to "maintain at least the current level of protection" (para. 13.7).

CHAPTER 13: GENERAL COMMENTS

13.420 *Chartered Institute for Archaeologists:*

The review pays insufficient attention to the importance of the planning system in Wales for the management and protection of undesignated historic assets (and particularly those with archaeological interest) and fails to consider the effect of proposals upon them or whether other changes to the regime might be *introduced* better to manage and protect them.

Value of the historic environment for Wales: Welsh Government rightly recognises that the historic environment 'is a finite and non-renewable resource and a vital and integral part of the historical and cultural identity of Wales' which contributes 'to economic vitality and culture, civic pride, local distinctiveness and the quality of Welsh life'1. Furthermore, its management and protection are key components of sustainable development (see paragraph 1.6 of TAN 24 The Historic Environment).

The heritage sector in Wales supports over 40,500 jobs (2.9% of Welsh employment) and contributes around £1.8 billion in output and £932 million to Wales's national gross value added (2.8 per cent of the Welsh economy), thus contributing over twice as much to the economy as the agriculture sector. 59% of Welsh people visit a heritage site every year and in 2015-16 Wales' historic environment attracted 3.3m visitors from other parts of the UK, and 61% of overseas visitors said they came specifically to see historic buildings and ancient monuments, some 591,000 people spending over £250m in doing so.

Importance of planning for the historic environment in Wales: The planning system plays a key role in the management and protection of the historic environment in Wales. That role is not confined simply to designated assets. Over 90% of the historic environment is undesignated (i.e. not specifically protected by listing, scheduling or some other statutory designation) and is, for the most part, solely protected as a 'material consideration' in the planning process. In many ways, therefore, the planning system is more important to the management and protection of undesignated assets than it is in respect of designated assets. Some undesignated assets are of equivalent importance to those which are designated and previously unknown assets may be identified by archaeological assessment/evaluation during the plan-making or development management processes (see paragraph 6.4.7 of Planning Policy Wales).

Historic assets are widely defined and the distinction between listed buildings and scheduled monuments (or, more generally and inaccurately, 'archaeology') can often be misleading as many buildings have archaeological interest and many assets with archaeological interest are buildings. Indeed, some scheduled monuments are also listed buildings, for instance, Conwy Castle, which is a scheduled monument and a listed building, as well as a World Heritage Site and was the most visited of CADWs castles in 2017, with over 200,000 visitors .

Threats to the historic environment in Wales: Limited resources for local authorities and other public bodies in the wake of the recession and pressure to 'kick-start' the economy, in part, by relaxing planning regulation (for instance, through the extension of permitted development rights) has left the historic environment vulnerable to harm.

Research in 2012 showed reductions in staffing levels for conservation and archaeological staff in Wales and that trend has continued. A recent report by the Historic Environment Group on the impacts and opportunities of Brexit for the historic environment in Wales (June 2017) identified that the scrapping or watering down of EU-derived environmental protection legislation could lead to irreversible damage to the built heritage of Wales. This is a potential threat that is yet to be realised. We would consider that any revision of heritage legislation in relation to planning law at the current time would be premature, since there are likely to be implications from the EU transition that may need addressing in the near future.

The proposed merger of listed building consent with planning permission: This is the proposal which has engendered by far the most discussion and concern in the historic environment sector. Important as it is (we address it under question 13.1), this should not, however, blind us to other aspects of the inter-relationship between planning and the historic environment.

Other Issues: In particular, the review does little, if anything, to address the crucial importance of the planning system in managing and protecting undesignated historic assets. Indeed, the focus on designated assets risks inadvertently reducing the protection for those assets which are not designated, contrary to the intention expressed in paragraph 3.10 of the review. This is not an issue which can be left to any future historic environment code, given the central role of planning in this regard.

Furthermore, the clear-cut distinction drawn in the review between buildings and monuments overlooks the complex inter-relationship of heritage values potentially to the detriment of the historic environment.

13.421 *Institute of Historic Building Conservation:* Although the proposed Code is an opportunity to clarify the statutory duty of Local Planning Authorities towards listed buildings, this should be in the light of our on-going concerns about the proposed unification of consent and the potential impact this may have on local authority conservation expertise. As a statement of our initial view on the central point of this consultation we do not consider that Listed Building consent should be unified with planning permission.

The 1990 Act requirement for special regard to the desirability of preserving buildings, features and setting applies only to the granting of planning permission (S66), and not to the LPA's other planning functions, in particular, enforcement – or indeed any of its other functions. This renders Listed Building enforcement all too susceptible to being filed as too difficult or unpleasant, in the guise of 'expediency'. A clear statutory duty to have special regard to the desirability of preserving LBs and other Heritage Assets in exercising its enforcement function would be a huge benefit.

13.422 *Society for the Protection of Ancient Buildings:* The SPAB welcomed the introduction of the Historic Environment (Wales) Act 2016 and the beneficial changes for historic environment protection that it contains. The Act has been well received by a wide range of people both within the sector and building owners, and arguably Wales now benefits from having the most robust and progressive heritage protection in the United Kingdom. We are concerned that this review is taking place before the Act has bedded in and before its effectiveness has been evaluated and appreciated. We believe that implementing the proposed reforms set out in the review would

undermine the exemplary protection that Wales is currently afforded by its new legislation.

The planning system is the key mechanism through which the historic environment is protected and managed in Wales and it is crucial to note that it currently protects both designated and undesignated heritage assets. Where assets are protected through statutory designation (be it through listing, scheduling or another form of national designation) there a high tests that must be met where a local authority is determining an application for their alteration or demolition. Undesignated heritage assets (locally listed buildings and assets not yet discovered) can be of equivalent importance and are often only identified through the plan-making or development management process. The identification of undesignated heritage assets relies on LPAs having adequate heritage expertise within their development management teams and the proposed reforms in the review seriously endanger the existence of those roles in local authorities. Additionally the review has not adequately dealt with the issue of undesignated heritage assets, to the potential detriment of the historic environment in Wales.

Threats to the historic environment in Wales: Limited resources within local authorities and in other public heritage bodies, coupled with de-regulation of the planning system, has left the historic environment vulnerable to harm. As already expressed, The Act is a positive and robust piece of legislation, but it should be noted that it cannot be implemented effectively while local authorities are not adequately resourced with dedicated conservation professionals. We consider it likely that a serious and unintended consequence of this review would be that conservation expertise is diminished further at a time where growth and housing need is putting pressure on the historic environment.

The review appears not to have appreciated that the historic environment is a complex and ever-evolving thing based on the interplay of multi-layered heritage values. The definition of heritage in the United Kingdom has progressed a great deal in the last 100 years, dealing with the intersection of built heritage and cultural heritage in a far more progressive way than many of our neighbours. Unfortunately the review has not taken this complexity into account and instead deals with buildings and monuments and designated assets in silos, which we anticipate would be to the detriment of the historic environment.

Chapter 14: Outdoor advertising

CONSULTATION QUESTION 14-1.

We provisionally propose that the definition of "advertisement" in the TCPA 1990 should be clarified, and included in the Bill alongside other provisions relating to advertising. Do consultees agree?

Number of responses

14.1 Total: 31 (31 in agreement).

Responses strongly in agreement

14.2 *National Trust:* The current definition of 'advertisement' has always been open to various interpretations. Therefore, we welcome this proposal.

Agree (without further comment)

14.3 ICE Wales, Caerphilly CBC, POSW South East Wales, Country Land and Business Association, Merthyr Tudfil CBC, Carmarthenshire CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Pembrokeshire CC, Newport CC, Torfaen CBC, The Law Society, Bridgend County Borough Council, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Huw Williams (Geldards)

Responses in agreement (with additional comment)

14.4 *Pembrokeshire Coast NPA& National Parks Wales:* In order to provide more clarity the Authority considers that (a) of the proposed definition should also include 'for the purpose of advertising'. Without this reference the definition will be open to misinterpretation from the public, advertisers and local planning authorities.

14.5 *Allan Archer:* While I do not disagree with the attempt to provide an improved and updated definition of advertisement I think further thought needs to be given to the wording to ensure it covers all methods of advertising, e.g. recent high tech advertising mechanisms (projection of images on a 'surface') and the content ('information' seems to me a possible useful addition to (a)).

14.6 *POSW, Monmouthshire CC, Ceredigion CC:* In order to provide more clarity POSW considers that (a) of the proposed definition should also include 'for the purpose of advertising'. This will reduce misinterpretation from the public, advertisers and LPAs.

14.7 *Blaenau Gwent CBC:* Agree. Indeed, the advertisement process is in need of root and branch review. The complexity of the regs and difficulty in interpreting the provisions (which often comes down to the size of lettering) present difficulties for practitioners.

14.8 *Theatres Trust:* Advertisements, banners and signage are a common and integral feature of theatre buildings. The Trust is supportive of measures within the Bill which would improve clarity and certainty for applicants The advertisement which is to be controlled is the physical means by which the message is put across not the message itself and on this basis it would be helpful if the definition was clarified in the Bill. Reference has been made in the consultation paper to advertisements via a searchlight beam; advertisements on buildings using light projections are becoming more frequent as is the use of audio. It is important that the definition covers these types of advertisements. (Planning Inspectorate (PINS))

14.9 *Neath Port Talbot CBC:* Agreed and consider that (a) of the proposed definition should also include 'for the purpose of advertising'. This will reduce misinterpretation from the public, advertisers and planning authorities.

14.10 *RTPI:* The current definition of 'advertisement' has always been open to various interpretations. Therefore, we welcome this proposal. However, this is providing it will sit alongside/mirror other provisions relating to advertising. Thought needs to be given to the wording to ensure it covers all methods of advertising, e.g. possible new high-tech advertising mechanisms (projection of images on a 'surface') and the content.

14.11 *Rhondda Cynon Taf CBC*: The Law Commission Paper does propose some changes to the primary legislation. These involve proposals to clarify the definition of "advertisement"; the word "land" be used in place of "site"; and a clearer definition of "person displaying and advertisement" in the 1990 Act. These changes are justified and the Council agrees to the provisional proposals set out in consultation questions 14-1 to 14-4.

14.12 *Liam Jones, NAPE Management Committee*: Agree that the definition needs to be looked at particularly given the way in which advertisements/signs have moved on somewhat from 1992. Clearly it needs to have reference to the fact that an advertisement is announcing, publicising, providing direction for something but that it includes the physical means of advertising something and for the 'purpose' of advertising.

CONSULTATION QUESTION 14-2.

We provisionally that the reference to "the display of advertisements" currently included in the statutory definition of "advertisement" in the TCPA 1990 could be omitted. Do consultees agree?

Number of responses

14.13 Total: 31 (31 in agreement).

Responses in agreement (without further comment)

14.14 Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW,

Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, Planning Inspectorate (PINS), Newport CC, Torfaen CBC, Neath Port Talbot, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.15 *The Law Society & Huw Williams (Geldards)*: Agree that the reference to "display" can be omitted. It appears to me that display in inherent in the nature and purpose of an advertisement.

14.16 *Rhondda Cynon Taf CBC*: The Law Commission Paper does propose some changes to the primary legislation. These involve proposals to clarify the definition of "advertisement"; the word "land" be used in place of "site"; and a clearer definition of "person displaying and advertisement" in the 1990 Act. These changes are justified and the Council agrees to the provisional proposals set out in consultation questions 14-1 to 14-4.

14.17 *PINS*: The display of advertisements is reference to the physical means by which the message is put across. If this is the basis of the definition there is no need to include reference to "the display of advertisements".

CONSULTATION QUESTION 14-3.

We provisionally propose that the word "land" is used in place of "site" and "sites", to be included:

(1) **in the provision of the Bill relating to the control of advertisements; and**

(2) **in the Regulations when they are next updated.**

Do consultees agree?

Number of responses

14.18 Total: 32 (32 in agreement).

Responses in agreement (without further comment)

14.19 ICE Wales, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Newport City Council, Torfaen CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.20 *Pembrokeshire Coast NPA, National Parks Wales, POSW, Monmouthshire CC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC:* Agree, however concerned that this will not cover unusual advertising methods such as searchlight beams. The 'Land' definition should be altered to capture such types of advertisements.

14.21 *Allan Archer:* The report presents a convincing case for a change of wording. However, some thought needs to be given to whether there are methods of advertising that does not take place on land (as proposed to be defined).

14.22 *Planning Inspectorate (PINS):* For clarity and simplicity either "land" or "site" should be used and "land" would be the preferable term in both the Bill and the Regulations when updated. However, a definition should be included to clarify that "land" includes buildings etc.

14.23 *RTPI:* We agree. Section 336 of the Act succinctly defines the word 'land' and it potentially will avoid confusion if there is simply one word used, with one definition. It must follow that any proposed change will be made within the Regulations when they are next updated. This chapter is not only looking at proposals to change primary legislation but is also suggesting changes to secondary legislation i.e. the regulations. We do not believe any exact dates or timetable has been provided for a review of the regulations, therefore there needs to be some certainty to ensure that any agreed proposals from this consultation are followed through when the review of the Advertisement Regulations takes place. The Welsh Government have suggested there will be a review of the regulations but we are not aware of dates or timetables.

14.24 *Cardiff Council*: Agree. Guidance with respect to certain types of advertisements would be beneficial i.e. unusual adverts search light beams etc.

14.25 *The Law Society & Huw Williams (Geldards)*: Agree that land is preferable term and should be used in place of "site" in this context.

14.26 *Rhondda Cynon Taf CBC*: The Law Commission Paper does propose some changes to the primary legislation. These involve proposals to clarify the definition of "advertisement"; the word "land" be used in place of "site"; and a clearer definition of "person displaying and advertisement" in the 1990 Act. These changes are justified and the Council agrees to the provisional proposals set out in consultation questions 14-1 to 14-4.

CONSULTATION QUESTION 14-4.

We provisionally propose that a definition of "person displaying an advertisement" in the TCPA 1990 be included in the Bill alongside other provisions relating to advertising, to include:

(1) the owner and occupier of the land on which the advertisement is displayed;

(2) any person to whose goods, trade, business or other concerns publicity is given by the advertisement; and

(3) the person who undertakes or maintains the display of the advertisement.

Do consultees agree?

Number of responses

14.27 Total: 33 (31 in agreement, and 2 in disagreement).

Responses in agreement (without further comment)

14.28 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.29 *The Law Society & Huw Williams (Geldards):* We agree that the Bill should follow the inclusive definition used in the Regulations, which is in any event the definition almost always referred to give the self-contained nature of the Advertisement Regulations.

14.30 *RTPI:* Based on the reasoning given in the consultation paper, we agree there should be one definition of 'person displaying an advertisement' and that this should take the form defined in the current Regulations. The definition provided in the Regulations is more robust and encapsulates all relevant interested parties.

14.31 *Planning Inspectorate (PINS):* There is a need for consistency in defining a person displaying an advertisement and its inclusion in primary legislation would assist in the interpretation of the Regulations. Since many advertisements are on behalf of third parties rather than the owner or occupier of the land it is necessary to include reference to any person whose goods, trade, business or other concerns is given publicity by the advertisement. However, in many instances it is the advertising contractor who is responsible for undertaking the display and it would therefore be logical to include the person who undertakes or maintains the display of the advertisement in the definition.

14.32 *Rhondda Cynon Taf CBC*: The Law Commission Paper does propose some changes to the primary legislation. These involve proposals to clarify the definition of "advertisement"; the word "land" be used in place of "site"; and a clearer definition of "person displaying and advertisement" in the 1990 Act. These changes are justified and the Council agrees to the provisional proposals set out in consultation questions 14-1 to 14-4.

Responses in disagreement (with additional comment)

14.33 *Central Association of Agricultural Valuers:* Whilst we understand that it is important to identify the owner and occupier of land where advertisements are displayed for the service of relevant notices, we do not believe that they should automatically be considered to a "person displaying an advertisement" for the purposes of the definition. We believe there is a distinction to be made between providing permission for the display of an advertisement and personally displaying an advertisement, with full responsibility for it.

Where the landowner is not the occupier, he may, according to the terms of the tenancy or other occupation, have little control over this and may perhaps be even as anxious as the planning authority to have an advertisement removed. Development control is about the use of land and so should control the user.

Importantly, owners and occupiers should not be in any way liable for any misrepresentation within a third party's advertisement which they might otherwise be if they were considered to be the person displaying the advertisement.

14.34 *Sirius Planning:* We disagree that the definition of person displaying an advert should include both the owner and occupier. It should relate to either the owner or occupier; it is unreasonable for the land owner to be liable for advertising that is relevant to any business, or otherwise, occupying the land.

CONSULTATION QUESTION 14-5.

We provisionally propose that a discontinuance notice under the advertisements regulations:

(1) should contain a notice as to the rights of any recipient to appeal against it;

(2) should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service); and

(3) should be "issued" (rather than "served" as at present), with a copy served on all those deemed to be displaying the advertisement in question.

Do consultees agree?

Number of responses

14.35 Total: 31 (31 in agreement).

Responses in agreement (without further comment)

14.36 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC and POSW South East Wales, CLA,POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, Newport City Council, Torfaen

CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Huw Williams (Geldards), Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.37 *Planning Inspectorate (PINS):* The omission regarding the right to appeal against a discontinuance notice should be rectified. Giving a specific date on which a notice would come into effect would provide clarity for all parties. The use of "issued" rather than "served" with copies of the notice to all those involved in displaying the advertisement would remove uncertainty and avoid prejudice.

14.38 *RTPI:* It seems logical to bring this procedure in line with the process relating to enforcement notices.

14.39 *Rhondda Cynon Taf CBC*: Because the control of advertisements is primarily the subject of regulations, the Law Commission has included some suggestions for changes that need to be introduced when the regulations are next up-dated. It proposes that the procedures relating discontinuance notices – removing the deemed consent for particular advertisements – should be tightened up, so that a notice is issued by the planning authority, with copies served on those deemed to be displaying the advertisement, and comes into force on the date stated in it. This would bring the procedures into line with those relating to enforcement notices. Accordingly, the Council agrees to the provisional proposals set out in consultation questions 14-5 and 14-6.

CONSULTATION QUESTION 14-6.

We provisionally propose that section 220(2), (2A) and (3) should be replaced with a provision enabling regulations to be made providing for:

(1) **the dimensions, appearance and position of advertisements that may be displayed, and the manner in which they are to be affixed to the law;**

(2) **the prohibition of advertisements being displayed or land being used for the display of advertisements without either deemed or express consent;**

(3) **the discontinuance of deemed consent;**

(4) **the making and determination of applications for express consent, and the revocation or modification of consent;**

(5) **appeals against discontinuance orders and decisions on applications for express consent;**

(6) **areas of special control over advertising; and**

(7) **consequential and supplementary provisions.**

Do consultees agree?

Number of responses

14.40 Total: 31 (31 in agreement).

Responses strongly in agreement

14.41 *Planning Inspectorate (PINS):* Whilst the enabling provisions in the Act might be longer it would facilitate a more straightforward approach and allow the Regulations to be shorter and clearer to the benefit of all.

14.42 *National Trust, RTPI:* Support the proposed approach which appears more straightforward and much clearer to interpret.

Responses in agreement (without further comment)

14.43 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, POSW, Monmouthshire CC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Huw Williams (Geldards), Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.44 *CLA:* This sets out a much clearer approach. However, we are concerned about the proposal to discontinue “deemed consents” as it is very difficult and/or expensive to obtain the alternative brown signs to support rural businesses and activities. It is a question of scale. Surely ‘mobile’ billboards that promote local initiatives could be retained in some form for a temporary period of time?

14.45 *Merthyr Tudfil CBC:* Agreed. Regs would need to be updated at the same time. This would result in the loss of income unless the advert fee is added to the PP fee.

CONSULTATION QUESTION 14-7.

We provisionally propose that deemed consent under the Advertisements Regulations should be granted for a display of advertisements that has the benefit of planning permission. Do consultees agree?

Number of responses

14.46 Total: 33 (31 in agreement, and 2 others).

Responses in agreement (without further comment)

14.47 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Cynwyl Elfed Community Council, Merthyr Tudfil CBC, Blaenau Gwent CBC,

Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Pembrokeshire CC, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Huw Williams (Geldards)

Responses in agreement (with additional comment)

14.48 *National Trust, RTPI:* This proposed provision appears to be a logical way forward and will avoid the need to submit two different types of consent.

14.49 *Theatres Trust:* The Trust agrees with this proposal, which would simplify the planning process and reduce costs for applicants by removing unnecessary duplication.

14.50 *Planning Inspectorate (PINS):* To bring the display of advertisements within the scope of development requiring planning permission may help simplify the situation. However it is not essential provided there is the ability for a scheme with planning permission to benefit from deemed consent under the Advertisement Regulations. This in itself would streamline the system subject to all the necessary details in respect of the advertisement forming part of the planning application.

14.51 *Rhondda Cynon Taf CBC*: The Law Commission also propose that deemed consent should be granted for a display of advertisements that has the benefit of planning permission (for instance, a shop fascia), which will avoid two approvals being necessary. Also, it proposes that the display of an advertisement on the exterior of a vehicle (other than on a highway) should be brought within the scope of the regulations, and normally benefit from deemed consent, which will enable planning authorities to bring within control particular displays. Accordingly, the Council agrees to the provisional proposals set out in consultation questions 14-7 and 14-8.

14.52 *Liam Jones, NAPE Management Committee*: Agree. But clarity will be need to define the circumstances under what aspect of the scheme granted planning permission has advertisement consent. Display of an advertisement in a pre-agreed fascia sign is fine but displaying a whole host of advertisements on say the wall or glazing of the shopfront would not be permitted.

Other comment

14.53 *The Law Society:* Our concern with this proposal is the ability for an LPA to potentially issue a discontinuance notice in respect of an advertisement that it had previously specifically approved by granting planning permission.

There are an increasing number of examples of buildings being specifically designed to host advertisements in prominent locations – see alongside the M4/A4 in West London. If an LPA has specifically authorised that advertisement by granting planning permission it seems to us that it shouldn't be able to revoke that consent in the future.

An LPA can only revoke a planning permission pursuant to S97 TCPA 1990 up to such time before the operations has been completed, and then only subject to paying compensation. In practice, this is a rarely used power but we suggest the advertisement regime should be consistent with the broad principle.

One way around this (rather than providing that advertisements that have the benefit of planning permission are considered to also have deemed consent) is to adopt the approach advocated in the next section in respect to advertisements on vehicles and simply make clear that advertisements that have the benefit of planning permission do not require advertisement consent.

As an aside, we support the suggestion in paragraph 14.53 that the Irish system could be adopted whereby "advertisements" are considered to constitute "development" but then extend permitted development rights to the stated categories of deemed consent.

14.54 *Andrew Ferguson:* In terms of the proposal that deemed consent should be granted for a display of advertisements that has the benefit of planning permission (such as a shop fascia), it is unclear whether this is a general deemed consent for signs of a certain design/ scale etc or whether it would only apply where the details were provided as part of the planning application itself. This is unclear so difficult to comment on but the latter approach would be acceptable (providing conditions can be attached regarding the advertisements). A procedure to enable planning and advertisement consent to be considered as part of one application and on one decision notice (rather than having to split them and consider them separately at present as they are issued under separate Regulations) would also be welcomed.

CONSULTATION QUESTION 14-8.

We provisionally propose that the display of advertisements on stationary vehicles and trailers be brought within control by the Regulations being amended so as to provide that:

(1) **no consent (express or deemed) be required for the display of an advertisement inside a vehicle, or on the outside of a vehicle on a public highway;**

(2) **deemed consent be granted for the display of an advertisement on a vehicle not on a highway, provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements.**

Do consultees agree?

Number of responses

14.55 Total: 32 (29 in agreement, and 3 equivocal responses).

Responses in agreement (without further comment)

14.56 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, National Trust, Newport City Council,

Neath Port Talbot CBC, Bridgend CBC, Keith Bush, PEBA, Cardiff Council, Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.57 *Allan Archer:* I agree with this proposal but I think thought will need to be given to the definition of (2) to clearly exclude those cases where advertisements are mounted on a vehicle normally employed as a moving vehicle ,e.g. a trailer, but which are stationed off-highway, e.g. in afield next to a highway or on the highway verge or in a layby, intentionally for advertisement purposes.

14.58 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Agreed – however (2) needs to be clear in terms of definition.

14.59 *Planning Inspectorate (PINS):* Advertising on parked vehicles and trailers appears to be on the increase and is particularly unsightly in the open countryside and measures to bring them within control by the amendment of the Regulations are welcomed. However, it is also necessary to ensure that there is an ability to control advertising on a particular site or larger area through discontinuance notices and directions from Welsh Ministers.

14.60 *Huw Williams (Geldards)*: Agree. This is a well-known problem and this proposal introduces greater clarity to aid effective enforcement.

14.61 *Rhondda Cynon Taf CBC*: The Law Commission also propose that deemed consent should be granted for a display of advertisements that has the benefit of planning permission (for instance, a shop fascia), which will avoid two approvals being necessary. Also, it proposes that the display of an advertisement on the exterior of a vehicle (other than on a highway) should be brought within the scope of the regulations, and normally benefit from deemed consent, which will enable planning authorities to bring within control particular displays. Accordingly, the Council agrees to the provisional proposals set out in consultation questions 14-7 and 14-8.

Equivocal responses

14.62 *The Law Society:* This is a well-known problem and we agree with the broad approach proposed. We are less certain that the proposed wording quite works in respect of stationary vehicles and trailers parked on the public highway either in laybys or on the main carriageway. The current position is that no consent is required provided the vehicle is "normally employed as a moving vehicle" and is not principally used for the display of advertisements. The proposal carries forward this requirement to the second limb in paragraph (2) – relating to non-highway land – but not in respect of paragraph (1) in respect of highway land. We are unsure whether this is intentional but would suggest the same wording should apply to paragraph (1) to make clear that:

> "no advertisement consent (express or deemed is required for the display of an advertisement inside a vehicle, or on the exterior of a vehicle on a public highway provided that the vehicle is normally employed as a moving vehicle and is not used principally for the display of advertisements"

There are some powers under the Highways Act to deal with vehicles on the public highway but, in my view it would be sensible to adopt a consistent approach to the planning/advertisement framework.

14.63 *RTPI:* The display of advertisements on vehicles has always posed a particular problem for LPAs and it is encouraging to see this consultation paper attempting to address the issue. However, further consideration needs to be made in respect to any specific wording of any new provisions attempting to control this type of advertising. In terms of the proposed drafting, we would currently question the definition of a 'vehicle' and a 'highway'. Further thought should be given to the definition of (2) to exclude those cases where advertisements are mounted on a vehicle normally employed as a moving vehicle, e.g. a trailer, but which are stationed off-highway, e.g. in afield next to a highway or on a highway verge or in a layby, intentionally for advertisement purposes.

14.64 *Torfaen CBC:* No. It is accepted that advertisements inside a vehicle are unlikely to cause problems and could therefore not require any deemed/express consent. However, in terms of advertisements on the outside of a vehicle, even those displayed on roads can be harmful. Furthermore, the extent of a "public highway" does not just include a road; it can include pavement, hardsurfaced areas and grass verges. We would therefore not wish to see this part of the provision being introduced. It is recognised that the existing category of advertisements on and in vehicles needs improving, however, unfortunately, we have not been able to think of any alternative wording to address the shortcomings associated with the existing wording. It is a good idea to bring this category of advertisements within the control of deemed consent, thus allowing LPA'S the option of serving discontinuance notices.

CONSULTATION QUESTION 14-9.

We provisionally propose that:

(1) **a provision should be introduced in the Advertisements Regulations to enable a certificate of lawfulness to be issued in relation to a display of advertisements; and**

(2) **an appropriate enabling provision should be included in the Bill, in line with the approach indicated in Consultation question 14-6.**

Do consultees agree? And what might be the resources implications of this proposal?

Number of responses

14.65 Total: 30 (18 in agreement, and 12 in disagreement).

Responses in agreement (without further comment)

14.66 Caerphilly CBC, POSW South East Wales, Theatres Trust, Neath Port Talbot CBC

Responses in agreement (with additional comment)

14.67 *ICE Wales & Cardiff Council:* Yes. Unable to assess the resource implications.

Blaenau Gwent CBC: Agree. Would not anticipate this resulting in many applications.

14.68 *Newport City Council:* Yes, enables a person to prove the advert benefits from deemed consent. No obvious changes to resources as will be offset by rolling up of advert consent and planning permission.

14.69 *Torfaen CBC, Bridgend CBC:* Yes, provided the fee is commensurate with the works involved in determining an application.

14.70 *Keith Bush:* Agree in principle. But the necessary resources should be considered in greater detail.

14.71 *CLA:* Yes. The CLA has had to advise a few members about this matter over the years, most especially in England. We do not foresee much in the way of resource implications. A CLEU-type application will incur a fee, so there will be the ability to recover costs to cover the new activity.

14.72 *The Law Society & Huw Williams (Geldards):* We agree. While this is an additional procedure, the position will become much clearer and time spent in correspondence and disputes will be saved by the authority being able to point to the certificate procedure.

14.73 *PINS:* A mechanism is required which allows certainty as to whether consent is required for a specific display of advertisements and this cannot be gained from informal opinions given by an authority. An appropriate enabling provision is therefore required in the Bill which would allow the Regulations to enable a certificate of lawfulness to be issued. However, if advertising was brought into mainstream planning, would such provision be required?

There would be a resource implication but the scale would depend on the number of applications received balanced against possible discontinuance notices or other action.

PEBA: Yes in principle. Others are better placed to comment on the resource implications.

14.74 *Rhondda Cynon Taf CBC:* The Law Commission considers there should be a procedure, similar to applying for a certificate of lawfulness of existing or proposed development, to enable anyone to discover whether a particular display of advertisements is or would be lawful. This will be a new procedure to be operated by planning authorities and will have resource implications, especially as planning fees for advertisement are generally lower than they are for other kinds of development. However, the procedure for applying for certificates of lawfulness generates comparatively few applications as a proportion of the total planning related applications to the Council, therefore the resource implications are [in my view]unlikely to be significant. Accordingly, the Council agrees to the provisional proposals set out in consultation question 14-9.

14.75 *Liam Jones, NAPE Management Committee*: Agree. This is a particularly area of control where uncertainty currently exists. Developers/public will contract the LPA asking whether or not permission is needed for the display of an advertisement but there is no formal mechanism available to give an 'answer'. This is left to informal opinion by an officer outside of an application process – this could lead to future problems say with a new advertisement being displayed on the same site and it being considered by the LPA in a future date that it would require permission. A certificate route would reduce uncertainty and given the fact prosecution could be pursued for an offending advert is important. Whilst it could be argued that it produces another layer it would give LPA certainty and a fee for those applications which it otherwise would not get when giving general feedback.

Responses in disagreement (with additional comment)

14.76 *Pembrokeshire CC, Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC:* The current system serves us well, whereby applications for retrospective advertisements can be made. Given the number of advertisements in Cities and Towns there is a concern that an influx of such applications may be made and the LPA would be under-resourced to deal with them. The advertisements would also be granted deemed consent from action provided they have been erected for a period in excess of 10 years (see 14-10 below). The provision of a Certificate application adds another stream to the Bill, over complicating the process.

14.77 *Ceredigion CC*: Disagree - The provision of a Certificate application adds another stream to the Bill, over complicating the process.

14.78 *Allan Archer:* I am not sure if this will be necessary given the recent changes to pre-application enquiry processes.

14.79 *RTPI:* We question whether such a proposal is actually required in light of recent formal pre-application enquiry processes? It would appear to create an additional workload for an LPA and we therefore question the benefit in the long term?

14.80 *POSW, Monmouthshire CC:* Disagree - The provision of a Certificate application adds another stream to the Bill, over complicating the process. However, there was a small number of Authorities which had no objection seeing them as a standard mechanism for demonstrating development is deemed or permitted.

14.81 *Merthyr Tudfil CBC:* Disagree. Bureaucratic and does nothing to simplify the planning process!

14.82 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Whilst the reasoning behind the recommendation is understandable, it is worth considering whether this is in reality an issue for planning authorities and practitioners in Wales. This will may result in resource issues for Planning Departments and Legal officers, at a time of potential cuts to budgets. In such circumstances it should be considered whether this is an area which justifies the changes proposed.

CONSULTATION QUESTION 14-10.

We provisionally propose that what is now Class 13 in Schedule 3 to the 1992 Regulations should be amended to provide that deemed consent is granted for the display of advertisements on a site that has been used for that purpose for ten years, rather than by reference to a fixed date (currently 1 April 1974).

Do consultees agree?

Number of responses

14.83 Total: 30 (29 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

14.84 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire CC, Newport City Council, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council

Responses strongly in agreement

14.85 *Planning Inspectorate (PINS):* A rolling ten-year period for deemed consents seems greatly preferable to a fixed date and it would still allow an authority sufficient time to take discontinuance action where necessary.

Responses in agreement (with additional comment)

14.86 *The Law Society & Huw Williams (Geldards):* We agree. This is sensible "future proofing" and ten years is consistent with the enforcement for change of use.

14.87 *RTPI:* This is a logical approach to take and we welcome the proposed change. The current fixed date of 1 April 1974 has lost all relevance, simply due to the passage of time. The ten-year approach fits well with other current timescales within the legislation.

14.88 *Allan Archer:* On the basis that this is consistent with enforcement provisions I am in agreement with this proposal. Advertisements by their nature are intentionally visible so 10 years seems a reasonable length of time for any advertisement causing harm to amenity or other considerations to be identified.

14.89 *Theatres Trust:* The Trust agrees with this proposal, although we suggest the insertion of a stipulation that the time limit does not apply to listed buildings.

14.90 *Rhondda Cynon Taf CBC*: The Law Commission proposes that deemed consent be granted for an advertisement on land that has been used for advertising for ten years, rather than, as present, for one on a site that has been used since 1974. As 1974 recedes gradually into history, it becomes increasingly difficult to be certain when a site was first used for advertising, therefore a rolling ten-year period is greatly

preferable. Accordingly, the Council agrees to the provisional proposals set out in consultation question 14-10.

14.91 *Liam Jones, NAPE Management Committee*: Agree but unless there is a certificate method then this would be difficult to address in practice.

Responses in disagreement (with additional comment)

14.92 *Torfaen CBC:* No, there are so many advertisements that do not have the necessary consent, that if they were to be granted deemed consent after 10 years then this could cause problems. Although it would be possible to serve discontinuance notices on any that are unacceptably harmful, this would involve potentially more time and resources than pursuing a prosecution. That is not to say that the existing Class 13 is fit for purpose. One of the problems with this Class is that there is no onus on the advertiser/site owner to prove that the site has been used for advertising since 1974, but on the LPA. This means that the only recourse a LPA has is to pursue a prosecution. However, the onus is on the prosecution (i.e. LPA) to prove that a site hasn't been used for advertising which is often difficult, and in most cases impossible. If there was a requirement under Class 13 for a LPA to be satisfied that a site has been used for advertising continuously since 1974, and that a legal determination could be made through the proposed introduction of LDC applications for advertisements then this would help.

CONSULTATION QUESTION 14-11.

We provisionally propose that the power (currently in section 224(1), (2) TCPA 1990) for the Welsh Ministers to include in Regulations provisions similar to those governing enforcement notices should not be restated in the Bill. Do consultees agree?

Number of responses

14.93 Total: 30 (26 in agreement, 3 in disagreement, and 1 other).

Responses strongly in agreement

14.94 *Pembrokeshire Coast NPA, and National Parks Wales:* The Authority welcomes this change.

14.95 *Carmarthenshire CC:* The authority welcomes this change – cuts down on duplication.

Responses in agreement (without further comment)

14.96 ICE Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Theatres Trust, Pembrokeshire CC, Planning Inspectorate (PINS), Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Huw Williams (Geldards), Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.97 *Allan Archer:* I think that, as Regulations under s224(1) and 224(2) have never been made and there are alternative powers proposed (proposal 14.12) that these linked proposals are satisfactory, subject to the following: I see no real reason to depart from the 14 days notice period provided in the Dyfed Act.

14.98 *Rhondda Cynon Taf CBC*: In relation to unauthorised advertisements, at present, there is a power to remove an unauthorised poster or placard, under Section 225 of the 1990 Act, but not the hoarding or structure on which it is being displayed. The Law Commission proposes the introduction of a single procedure which will enable planning authorities to remove any unauthorised advertisement, including the hoarding. This will be helpful and simplify the powers of planning authorities to be able to remove any unauthorised advertisements. Accordingly, the Council agrees to the provisional proposals set out in consultation questions 14-11 and 14-12.

Responses in disagreement (with additional comment)

14.99 *Caerphilly CBC, Rhondda Cynon Taf CBC & POSW South East Wales:* No, this requires further consideration because it appears to place the burden on LPAs to remove all unacceptable unauthorised signage, whereas there should be a process whereby the offender is required to remove it.

14.100 *RTPI:* We are aware of the general enforcement provisions of the Act being used to control advertisements. It provides an added mechanism to deal with unauthorised advertisements, where other alternatives have not appeared possible. Further research is required before proposing not to restate this enabling power in the Bill.

CONSULTATION QUESTION 14-12.

We provisionally propose that the powers currently in section 225 of the TCPA 1990 (removal of unauthorised posters and placards) and in section 43 of the Dyfed Act 1987 (removal of other unauthorised advertisements) should be replaced with a new single procedure allowing the removal of any unauthorised advertisements, subject to

(1) **no advertisement being removed without 21 days' notice having first been given to those responsible;**

(2) **a right of appeal being available to recipients of such a notice and to owners and occupiers of the site of the offending advertisement, as under section 225B of the TCPA 1990 – on grounds relating to the lawfulness of the advertisement, the service of the notice, and the time for its removal;**

(3) **compensation being payable by the planning authority for damage caused to land or chattels by the removal of the advertisement (other than damage to the advertisement itself); and**

(4) **protection for statutory undertakers to be afforded as under section 225K.**

Do consultees agree? What are the likely resource implications of this proposal?

Number of responses

14.101 Total: 28 (27 in agreement, and 1 in disagreement).

Responses strongly in agreement

14.102 *Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC:* Welcome this proposal and whilst there will be an increased demand on resources it is not considered that the demand would be so significant.

14.103 *Planning Inspectorate (PINS):* A single procedure allowing the removal of unauthorised advertisement is welcomed as it would remove inconsistencies in current legislation. Powers to remove any unauthorised advertisements should also extend, where appropriate, to the removal of the structures used for their display. Any resource implication would depend on the increase in the number of actions taken coupled with how many result in appeals and claims for compensation.

Responses in agreement (without further comment)

14.104 Pontarddulais Town Council, ICE Wales, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Ceredigion CC, Theatres Trust, Pembrokeshire CC, Bridgend CBC, Keith Bush

Responses in agreement (with additional comment)

14.105 *POSW, Monmouthshire CC, Neath Port Talbot CBC:* Agreed. But 21 days would be ineffective for fly posting.

14.106 *ICE Wales:* Yes. Unable to assess the resource implications.

14.107 *CLA:* Yes – don't know [as to resources].

14.108 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Agreed. No comment as to resource as this a matter for LPAs.

14.109 *Newport City Council:* Yes but 21 days compliance period is not suitable when dealing with fly posting. Also what happens with collected signs? Currently we have to give them time to collect the recovered advert.

14.110 *Torfaen CBC:* Yes, it is probably cheaper to exercise these powers rather than pursue prosecution proceedings. It would be necessary to ensure that LPA's had the necessary powers of entry onto land to carry out such works.

14.111 *The Law Society:* We agree with the proposed approach but pursuant to paragraph (1) would suggest that the requirement should be to give notice not just to "those responsible" (which isn't defined) but to all those who fall within the proposed new definition of "person displaying advertising" (see paragraph 14.4). In turn, in respect sub-paragraph (2) we suggest that one additional ground of appeal should be that express consent should be granted for the advertisement – mirroring the position under S174(2)(a) in respect of planning enforcement notices.

14.112 *RTPI:* The power s225 conveys is relatively quick and normally achieves a positive result with little paperwork involved. This proposal suggests a more drawn out process including a right of appeal with specific grounds. We question the necessity of this procedure when the existing one appears effective? However, we note the proposal is to extend the power to remove any advertisement displayed without consent or in breach of conditions attached to consent. While we welcome this wider spectrum, further consideration of the detail are needed, including the appeal process. Potentially this new power will create greater resource implications to an Authority. Furthermore, the current timescales involved with the current procedure are much shorter than proposed. Is there recent case law that supports the need to replace the current s225 provisions?

14.113 *Institute of Historic Building Conservation (IHBC):* With respect to outdoor advertising, we would respond to Question 14.12, that it is a good idea for LPAs to be able to remove adverts. However, the proposal does not address the problem of A-boards and other portable adverts. We would also propose that any new regulations remove the circular arrangement in the current English advert Regulations, whereby adverts within 1m of a window are excluded from consent under one class, but then included under another that permits any advert inside a building. It would be difficult to prove, for example, that plastering the inner face of windows of a listed building with adverts comprised 'works' and therefore needed LBC, and this is currently permitted by the advert regulations so no other control exists. One can also foresee future problems arising out of the use of means of digital light projection, and dealing with these now would be worthwhile.

Responses in disagreement (with additional comment)

14.114 *Barry Town Council:* Disagree - would seek to retain contain controls and powers re advertising.

CONSULTATION QUESTION 14-13.

We provisionally propose that the maximum sentence on conviction for unauthorised advertising should be increased to an unlimited fine, in line with other offences under the TCPA 1990 and the Listed Buildings Act 1990. Do consultees agree?

Number of responses

14.115 Total: 33 (31 in agreement, and 2 in disagreement).

Responses in agreement (without further comment)

14.116 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Monmouth Town Council, Pembrokeshire CC, Newport City Council, Torfaen CBC, Neath Port Talbot CBC, Bridgend CBC, Newtown and Llanllwchaiarn Town Council, Keith Bush, PEBA, Cardiff Council, Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.117 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Lawyers in Local Government:* Agreed – this would add consistency of approach and as a mechanism for deterrent.

14.118 *Planning Inspectorate (PINS):* Advertising can generate a substantial income and any conviction for unauthorised advertising should be brought in line with other offences such as those relating to protected trees and listed buildings.

14.119 *RTPI:* We support this proposal. Usually excessive time and resources are used to take prosecution proceedings, with the result being a small fine. This proposal will potentially deter larger companies from undertaking unauthorised advertising. For some companies the displaying of unauthorised advertisements is lucrative. The additional income raised normally far exceeds any current maximum fine given.

14.120 *The Law Society:* We agree with the proposal but this needs to be considered in the context of the overlap with remedies under the Proceeds of Crime Act.

14.121 *Huw Williams (Geldards)*: Agree that the penalties should be consistent with other planning enforcement crimes.

14.122 *Rhondda Cynon Taf CBC*: In view of the ease with which advertisements can be put up and taken down, and in light of the substantial gains that can be made through unauthorised advertising, the Law Commission proposes that the maximum sentence on conviction for unauthorised advertising be increased to an unlimited fine. This is considered appropriate and will bring the maximum penalty for unauthorised advertising in line with those applying to other planning offences. Accordingly, the Council agrees to the provisional proposals set out in consultation question 14-13.

Responses in disagreement (with additional comment)

14.123 *Theatres Trust:* The Trust has some concerns regarding this proposal. In principle the Trust is supportive, but some flexibility and discretion must be allowed as it is quite plausible that many instances of unauthorised advertising are undertaken unknowingly, particularly where they relate to community and voluntary groups.

14.124 *Canal & River Trust:* This would appear to be disproportionate. A maximum fine is perhaps more appropriate in respect of the advertisement regulations.

CONSULTATION QUESTION 14-14.

We provisionally propose that it be made clear on the face of the Bill, rather than (as at present) in the Regulations, that all functions under the Code relating to advertising should be exercised in the interests of amenity and public safety. Do consultees agree?

Number of responses

14.125 Total: 31 (31 in agreement).

Responses in agreement (without further comment)

14.126 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Theatres Trust, Pembrokeshire CC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.127 *Allan Archer:* This proposal raises the question of the relationship between the proposed general duty relating to any function under the Code (proposal 5.1) and any specific function where the factors to be considered are to be limited (as proposed here). In so far as this case is simply restating the existing provision provided in Regulations I do not disagree. However, I wonder if every individual provision under the Code also needs to be checked to see if any restrictions to the general duty are needed in any other individual cases.

14.128 *Planning Inspectorate (PINS):* It should be made clear in the Bill that all the functions under the Code relating to advertising should be exercised in the interests of amenity and public safety. It is also essential that Regulations continue to prescribe the detailed matters that are to be taken into account. Further, how does the issue of public safety in relation to this proposal sit with the Well-Being and Future Generations Act 2015?

14.129 *Huw Williams (Geldards)*: Agree that making public amenity and safety the policy test for advertisement control functions would be a useful clarification and restatement of the current position.

14.130 *Rhondda Cynon Taf CBC*: Finally, the Regulation 4 of 1992 Regulations provides that a planning authority exercising its powers under the Regulations must do so in the interests of amenity and public safety. However, that principle does not extend to the exercise of functions (for instance, prosecutions for unauthorised advertising) relating to advertising under the 1990 Act. Consequently, those accused of displaying unauthorised advertisements sometimes rely on an argument that the display does not cause harm to amenity and is merely a “technical” breach. In practice a very large number of advertisements are displayed that technically in breach of the Regulations for one reason or another, but it does not seem appropriate for an authority to bring a prosecution where a breach merely is a technical one. The Law Commission proposes transferring from the regulations to the Bill the principle that any functions relating to advertising are to be exercised in the interests of amenity and public safety, which will have the effect of removing this problem. Accordingly, the Council agrees to the provisional proposals set out in consultation question 14-14.

CONSULTATION QUESTION 14-15.

We provisionally propose that the provisions in section 220 of the TCPA 1990 relating to advisory committees and tribunals should not be included in the Bill. Do consultees agree?

Number of responses

14.131 Total: 29 (29 in agreement).

Responses in agreement (without further comment)

14.132 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire CC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Rhondda Cynon Taf CBC, Liam Jones NAPE Management Committee, Huw Williams (Geldards)

Responses in agreement (with additional comment)

14.133 *Planning Inspectorate (PINS):* In view of the role administered by the Planning Inspectorate on behalf of the Welsh Ministers there would appear to be no need for provision to be made for special advisory committees or independent tribunals.

CONSULTATION QUESTION 14-16.

We provisionally propose that the provisions in section 221(1)(b), (2) of the TCPA 1990 relating to experimental areas be not included in the Bill. Do consultees agree?

Number of responses

14.134 Total: 29 (28 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

14.135 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire CC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Rhondda Cynon Taf CBC, Liam Jones Management Committee

Responses in agreement (with additional comment)

14.136 *Planning Inspectorate (PINS):* Given the limited use of the powers to establish experimental use there does not appear to be any need or justification for them and provision is therefore not required in the Bill.

14.137 *Huw Williams (Geldards)*: Agree that experimental areas have fallen into desuetude and should not be included in the Bill.

Responses in disagreement (with additional comment)

14.138 *Accessible Retail:* We oppose this recommendation. The ability to try out ideas and find they do not work before being launched on owners and occupiers is a valuable option which should be used more often rather than abolished.

CONSULTATION QUESTION 14-17.

It appears that section 223 of the TCPA 1990, providing for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948 is no longer of any practical utility, and should be not included in the Bill. Do consultees agree?

Number of responses

14.139 Total: 30 (29 in agreement, 1 equivocal).

Responses in agreement (without further comment)

14.140 ICE Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Monmouthshire CC, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Pembrokeshire CC, Newport City Council, Torfaen CBC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Rhondda Cynon Taf CBC, Liam Jones NAPE Management Committee

Responses in agreement (with additional comment)

14.141 *Huw Williams (Geldards)*: Agree that the effluxion of time has resulted in these rights also falling into desuetude. I they should not be restated.

Equivocal response

14.142 *Planning Inspectorate (PINS):* Provision for the payment of compensation in respect of the costs of removing advertisements on sites that were in use for advertising in 1948 may appear to be no longer of any practical utility. However, it is not known how many claims for compensation are now made and even if there are only a few, it may be seen as prejudice if the right to make a claim was no longer available.

CHAPTER 14: GENERAL COMMENTS

14.143 *Pembrey and Burry Port Town Council:* The Committee were agreed that these proposed changes were positive in clarifying outdoor advertising.

14.144 *Newport City Council:* Removal of requirement to advertise applications in newspapers. This is a very outdated mode of communication and notices of development should be able to be displayed on a suitable web site.

14.145 *National Grid:* The business does not have significant involvement in this regard, and has no comment to make on this part of the consultation.

14.146 *Huw Evans:* Do away with areas of special advertisement control. I have never known one to be reviewed and their purpose is very questionable.

Chapter 15: Works to protected trees

CONSULTATION QUESTION 15-1.

We provisionally consider that it would not be helpful to define a "tree" or a "woodland", in the context of what can be protected by a tree preservation order.

Do consultees agree? If they do not, what definitions would be appropriate?

Number of responses

15.1 Total: 41 (40 in agreement and 1 in disagreement).

Responses in agreement (without further comment)

15.2 Keith Bush, Lawyers in Local Government, Monmouthshire CC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Planning Inspectorate (PINS), Monmouth Town Council, Jon Brewin (Wrexham CC), Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, National Trust, Newport City Council, Bay of Colwyn Town Council, Torfaen CBC, PEBA, Cardiff Council, Huw Williams (Geldards), LTOA

Responses in agreement (with additional comment)

15.3 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Rhondda Cynon Taf CBC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC:* Yes. There are too many variations in species and form to specify without doubt; what a tree is. This should be left to the discretion of the planning authority and any subsequent consultations during confirmation.

15.4 *Andy Lederer, Chartered Foresters:* 'Tree': I agree that it doesn't really help to define too precisely what constitutes a tree and that it's probably best to use the broad definition accepted by Charles Mynors and others: 'anything that one would normally call a tree'. This will surely do fine in almost all situations.

In those rare circumstances where the point is being argued - e.g. a legal wrangle about whether or not a plant harmed was a tree, it's worth remembering that the idea of 'what is normal' in the tree context is in fact based quite firmly and tightly on what is/is not commonly seen in the UK, really a sort of unconscious averaging or accounting by both professionals and the general public alike. Thus say blackthorn, privet or rhododendron etc, occasionally, attain the dimensions of what one might consider a tree but not frequently enough for them normally to be considered trees. On the other hand, say hawthorn, hazel or box grow sufficiently large sufficiently often to be normally regarded as trees.

The geographic context is, of course, relevant in that quite a few exotics that don't usually attain 'tree size' in the UK certainly often do in their native areas/countries – e.g. say Rhododendron, Griselinia, and the various Olearia spp.

'Woodland': Again, I basically agree with the very simple definition: 'Land covered with trees'. However, I'm not sure this couldn't be qualified slightly so as to help differentiate a woodland from just a group of trees. Surely for most of us a woodland has an overall ambience rather different to a group of trees, this relating not only to size but also to other characteristics which may include e.g. a variety of tree species/sizes, some sort of understorey, and wildlife habitats/conservation value etc.

Example: In my home area I'm about to propose TPO protection for an area of trees under threat from housing development. Although only approx. 50X50m the area is fully stocked with a wide variety of tree species, native and non-native and of various degrees of maturity. There is also a fairly dense understorey which gives a sense of seclusion and increases the area's wildlife conservation value. On account of these characteristics this 'land covered with trees' is surely a small woodland rather than simply a group of trees.

Sounds a bit cumbersome but could one define woodland as: 'Land covered with trees and with a distinctive ambience; more than just a group of trees'.

15.5 *Allan Archer:* I agree with the proposal as there are so many variations in species and form to specify without doubt what a tree is.

15.6 *Julian Morris:* I note that the importance of what constitutes a tree applies not only to TPOs but to Conservation Areas, and whereas in the former case there is an opportunity for a LPA to actively consider which plants in an area constitute trees, the protection in Conservation Areas are more passive and the difficulty then is for a plant owner in a Conservation Area to know whether or not he can remove a plant that may or may not constitute a tree. If he wrongly interprets a tree as a shrub and subsequently removes it, there is no trigger for the LPA to intervene or prosecute. The need is therefore for guidance to householders rather than LPAs. Whether it is worth giving LPAs, Ministers or the Executive the power or obligation to publish guidance on this is a matter of how much of a problem it is perceived to be.

The question of saplings in woodlands is a separate consideration. Most people would not ordinarily call a sapling a tree. It is perhaps a tree-in-waiting, but a 'young tree' is not the same as a 'tree', it is a compound noun that has a meaning distinct from its constituent words. It indicates only that it is of a species ordinarily considered a tree species and that it has germinated and is on its way to achieving the stature that would make it a tree-proper. Similarly, 'sapling' is on a spectrum between seedling and tree. If saplings are excluded from protection, a woodland owner can circumvent future protection buy systematically removing all saplings every few years, and eventually the woodland could die of natural causes. I come back to this point in other answers.

15.7 *Association of Local Government Ecologists (Wales):* We agree that defining a tree or a woodland would be difficult. What would be considered important in this context would change for different species of tree and type of woodland, in addition the importance would change depending on the location and the function that the tree or woodland held in an ecosystem and wider environmental context. Without fully understanding the function and the multiple-benefits that a particular tree or a woodland provides in a particular location we could be in danger of failing to protect

important trees/woodlands. This will need to be considered on a site by site basis, possibly taking a green infrastructure approach as set out in the emerging PPW.

15.8 *Arboricultural Association:* The word ‘tree’ is not a taxonomic term and woody species may be variously described as ‘trees’, ‘shrubs’ or ‘hedges’ dependent on their form or management. Similarly whether a group of trees can be described as woodland is a matter of degree and judgement based on the individual characteristics of the group of trees in question. The Arboricultural Association agrees that to define the term ‘tree’ or ‘woodland’ in law would not be beneficial and such definitions are more effectively communicated in guidance to local authorities tasked with the administration of tree preservation orders.

15.9 *Central Association of Agricultural Valuers:* We agree that it would be difficult to provide useful definitions of “tree” and “woodland” for the purposes of the regulations. We believe a common sense approach should be taken with such guidance as comes from existing case law.

15.10 *Mark Chester:* I agree that it can be difficult to define 'a tree'. For 'woodland', when does a group of trees become a woodland? Could it be that if it is not possible to detail the trees present in a group, it becomes a woodland?

15.11 *Woodland Trust, Ancient Tree Forum:* While the Woodland Trust and Ancient Tree Forum agree that it would not be helpful to define the term ‘tree’, the term ‘woodland’, if it is narrowly interpreted to trees only, may allow damage and loss of essential features of woodlands by those whose objectives are not conservation and appropriate woodland management. TPO’s on woodland are made exceptionally and are intended to augment felling licence control where the amenity (now agreed to be more than visual) is the object of control, not economic forestry. A list, on a non-exclusive basis, should be added of wooded habitat types that are relevant for protection especially those in which the whole mosaic habitat should be protected and not just the trees.

Ancient woodland is acknowledged as irreplaceable and rightly has strong policy protection. Forestry Commission Standing Advice states that ancient wood pasture and historic parkland are distinct types of ancient woodland, but existing TPO regimes lack mechanisms appropriate for the protection and conservation of all their special features. The Joint Nature Conservation Committee (JNCC) has identified wood pasture and parkland as priority habitat in a UK context within which trees, especially ancient and other veteran trees and scrub are a fundamentally important part of the structure yet are extremely vulnerable to loss or fragmentation by development. Recent research by the Gardens Trust has revealed that the threats to historic parks and gardens are increasing and well over a thousand planning applications for the hundred and fifty registered Brown parks have been received in the last fifteen years.

In a Wales context, ffridd or coedcae habitats have been described as a combination of woody trees and shrubs and grass/heathland species in a variety of successional stages but may be very vulnerable to forestry or agricultural intensification. It would be beneficial if TPO legislation could be used to protect such sites from loss or damage. These terms therefore should be included in a nonexclusive list of types of woodland or wood pasture.

Traditional orchards are also a type of wood pasture which is recognised as a specific priority habitat by JNCC and comprise 'open grown trees set in herbaceous vegetation'. As orchards are often close to settlements, farmhouses or other houses in spacious grounds they are extremely vulnerable to development pressures.

The Woodland Trust and Ancient Tree Forum consider that this is an opportunity for Wales to lead the way in recognising separately and protecting in law the special qualities – visual, biodiversity, culture and heritage – that these treed landscapes and special habitats represent. Either these types of treed habitat need to be mentioned as types of woodland as a non- prescriptive list that can be protected by existing TPO designations, or instead, ideally, a new term could be added to the list of TPO designations which would encompass wooded, mosaic landscape area of scattered open grown trees with provisions that are appropriate to its conservation.

Response in disagreement

15.12 *Mark Mackworth-Praed:* I believe it would be helpful, as is canvassed in the consultation paper, for there to be a partial definition of the term 'tree', even if this is only created in the negative, i.e. by the explicit exclusion of the term being capable of being applied to a 'hedge, bush or shrub'. I have acted for clients in the past who have had TPOs imposed on them which have clearly been inappropriately applied to vegetation that is plainly not 'trees', and this has normally been as a result of LPAs seeking to use the TPO as a convenient means of frustrating or impeding legitimate development aspirations. Challenging the appropriateness of such TPOs via the 28-day objection and confirmation process is time-consuming, expensive for clients, and often to no avail, as the authority normally simply endorses the TPO as provisionally made by its Tree Officer without regard to the appropriateness or otherwise of its coverage. A partial definition of what is, or what isn't, a 'tree' would in my view be an important safeguard against abuse of the TPO system by some LPAs.

For similar reasons, I would advocate a definition of the term 'woodland', and there seems little wrong with the Forestry Commission's definition – "Land under stands of trees with canopy cover of at least 20%, or having the potential to achieve this" – but I would add "but not including land in uses other than as woodland". Again, I have experience of LPAs seeking to encompass gardens, open grassland with scattered scrub, and disused sports pitches, within "woodland" TPOs (and these later being confirmed) – needless to say, again, in order to impede lawful development aspirations, and quite plainly this is wrong and should not be capable of being done under the TPO system. What is particularly insidious about this is that since the Palm Developments judgment, the effect of a TPO being used in this way (e.g. on an area of derelict grassland) is to in effect seek to create a woodland (as a result of natural succession) where none stood previously.

CONSULTATION QUESTION 15-2.

We provisionally propose that the Bill should provide;

(1) **that functions under the Code relating to the protection of trees should be exercised in the interests of amenity;**

(2) **that "amenity" for that purpose includes appearance, age, rarity, biodiversity, and historic, scientific and recreational value; and**

(3) **that tree preservation regulations may prescribe matters considered to be relevant to amenity.**

Do consultees agree?

Number of responses

15.13 Total: 47 (39 in agreement, 4 equivocal responses, 1 in disagreement, and 3 others).

Responses strongly in agreement

15.14 *Allan Archer:* I strongly support this proposal as at present trees that are historic, veteran, ancient or notable would not necessarily meet the criteria for protection under the existing legislation, even though they are key landscape features.

15.15 *Woodland Trust, Ancient Tree Forum:* We agree strongly that a non-prescriptive list of descriptors should be taken into consideration to widen the definition of 'amenity'. However, we would wish to see the term 'cultural' added to the range of terms.

Responses in agreement (without further comment)

15.16 Jon Brewin (Wrexham CC), Institution of Civil Engineers Wales, Keith Bush, Newport City Council, Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Bay of Colwyn Town Council, Torfaen CBC, Neath Port Talbot CBC, Lawyers in Local Government, CLA

Responses in agreement (with additional comment)

15.17 *Andy Lederer, Chartered Foresters:* I agree with all three proposals as to what constitutes 'amenity' and how this should relate to tree protection.

15.18 *Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, Rhondda Cynon Taf CBC, Ceredigion CC, Pembrokeshire CC:* Yes. At present trees that are historic, veteran, ancient or notable would not necessarily meet the criteria for protection under the existing legislation, even though they are key landscape features.

15.19 *POSW:* Yes. At present trees that are historic, veteran, ancient or notable would not necessarily meet the criteria for protection under the existing legislation, even though they are key landscape features.

15.20 *Association of Local Government Ecologists:* We welcome and agree to the definition of amenity as per the included list and particularly welcome biodiversity as forming a key part. We would also suggest adding 'landscape value' and 'green infrastructure value' to the definition list.

15.21 *Historic Houses Association:* We would suggest that the word 'landscape' should be included in the definition of 'amenity' set out in item 2.

15.22 *Mark Mackworth-Praed:* Although I agree the scope of the term 'amenity' could (and probably should) be broadened to include other attributes or values as is suggested, I believe that the element of such amenity being capable of being viewed or appreciated by the wider public (either in the tree's present or future context) is important, and should not be dispensed with. So I believe the current concept of the tree or trees being visible, or at least partially so, from 'a public place' should be maintained.

15.23 *Royal Society for the Protection of Birds:* Whilst we recognise and value the breadth of the subject matter addressed in this consultation, our response focusses on two consultation questions of importance to the RSPB. The first is simply to support, as the policy basis for the protection of trees, the broadening of the interpretation of the term 'amenity', to include as a minimum, 'rarity, biodiversity and scientific and recreational value'.

15.24 *Arboricultural Association, London Tree Officers Association:* (1) Yes; (2) Yes, but the AA feels it would be appropriate to include 'cultural' too; (3) Yes.

15.25 *National Trust:* Support the change to ensure that trees can be protected for other grounds than visual amenity.

15.26 *Monmouthshire CC:* Welcome of the expansion of the basis for making TPOs i.e. widening the meaning of amenity. Could also consider use of the word 'value'?

15.27 *The Law Society & Huw Williams (Geldards):* We agree with the proposed extended definition of "amenity" to include biodiversity and other relevant factors in determining the value of trees.

15.28 *RTPI:* This is a positive change to ensure that trees can be protected for other grounds than visual amenity.

15.29 *National Grid:* Although National Grid seeks to avoid damage to protected trees, there can be occasions when works to the national electricity of gas network leave no other option. The proposed clarity about what may constitute 'amenity' is likely to provide useful clarification.

15.30 *Canal & River Trust:* We agree in principle with the proposal in 15-2 to extend the definition of "amenity" when considering the need for Tree Preservation Orders. This will help protect trees of value in wider waterway corridors.

15.31 *PEBA*: Yes - amenity in this statutory context should extend beyond visual amenity alone.

Equivocal responses

15.32 *Planning Inspectorate (PINS):* It is helpful to decision makers to recognise that there should be a clear policy basis for the protection of identified trees. Although 'amenity' is a vague term it is general considered to relate to the attractive appearance and pleasant experience of an area. PINS consider it would be confusing and contrived to stretch the meaning of 'amenity' to cover other, separate factors such as the age, rarity and biodiversity value of the protected trees themselves. An ancient tree may

be valuable, and worthy of protection, because of its longevity or place in history whilst being a physically ugly specimen. Could these other attributes be swept up into a separate group eg 'the functions for the protection of trees should be exercised in the interests of amenity and/or the special value of a tree/trees in terms of age, rarity, biodiversity etc.'?

15.33 *Bridgend CBC:* Yes but in light of existing and emerging legislation in Wales (e.g. the Draft Planning Policy Wales Edition 10), should trees also be assessed in terms of their economic, social and environmental benefits?

15.34 *Mark Chester:* If we replace 'amenity' with 'public good', this could enable more trees of merit to be protected where they are in situations of limited or no public amenity. This can include veteran trees which are on private land with no public access.

15.35 *Cardiff Council*: There needs to be a clear, easy to use 'tick box and score-point' system (e.g. 'TEMPO') so that amenity value is considered objectively and consistently.

Responses disagreeing

15.36 *Julian Morris:* There are some fundamental issues to be got out in the open here. Some current guidance makes it clear that trees shouldn't be TPO'd unless they have a degree of public visibility. Thus the sequestration, for the public benefit, of the amenity that the tree provides is quite rightly limited to where the tree can be seen by the public.

Extending the definition of 'amenity' is a rather contrived and tenuous means of allowing public sequestration of other societal benefits. For example, an ancient tree in a private garden with no public access or visibility might be irreplaceable and rich in history and biodiversity, but if the public cannot enjoy that benefit, and the amenity cannot be enjoyed by the public, no matter what sub-class or invented interpretation of amenity that is.

The proposal should be seen for what it is, if that is desirable, to recognise that trees can have societal benefits or interests that should be preserved, even if there is not currently any way of the public directly seeing these. This is akin to the listing of the interior of private residences which are of special architectural or historic interest, without any ability to force the owner to let those interests be shared for the time being.

There is a case for preserving certain trees that cannot be seen by the public, because they indirectly provide benefits to society, but I think that open and honest consideration is needed on this in the context of inaccessible and/or non-visible trees, and separate criteria drawn up for 'special' arboricultural interest rather than trying to shoehorn these into an extended definition of 'amenity'. What is good for the Act is good for the Regulations in this regard, and guidance relating to requirements for public visibility will need to be reconsidered.

Other comments

15.37 *CLA:* Some CLA members have TPO trees located on scheduled monuments and the question then arises as to which takes precedent when works are needed.

15.38 *Woodland Trust, Ancient Tree Forum:* A Planning Authority may only make a TPO where it appears to the authority that it is "expedient" to protect a tree or woodland "in the interests of amenity". The Woodland Trust and Ancient Tree Forum do not agree that it is necessary for there to be a test of 'expedient'. The interpretation of this has been narrow, either restricting a LPA in exercising its powers or allowing challenge- despite government advice recognising that there cannot always be prior knowledge of threats. Indeed, intentions may not be revealed deliberately to enable pre-emptive felling- especially in development contexts. The tree or woodland should be protected if the tree or woodland is of sufficient value to society and not additionally because it is of risk of harm or loss. Expediency is not used in any other protection system in the UK and for irreplaceable and important trees should not be a requirement, especially as trees can be lost so readily through damage or speed of felling. We consider that the term expedient should be deleted from the legislation.

15.39 *Woodland Trust, Ancient Tree Forum:* TPO Tree protection does not differentiate trees or woodlands of national value from all other trees. There is no grading of trees or their habitat as there is with other protections such as Listed Buildings or Historic Parks and Gardens. The Woodland Trust and Ancient Tree Forum consider this is a serious limitation undervaluing the recognition and protection of trees of national special interest and wood pastures and parkland, and the Welsh Government should be required to prepare a List. If this list were prepared, then we would wish Local Planning Authorities to have a duty to consider protecting trees and woodlands included on it by TPO. This would not require an automatic making of TPOs as a management or partnership agreement would be a preferred approach, however it could be used if an agreement cannot be reached with the owner and such was considered desirable for the preservation of the trees or woodlands (see also Q 15-5).

CONSULTATION QUESTION 15-3.

We provisionally propose:

(1) **that the Bill makes it clear that tree preservation orders can in future be made to protect trees – specified either individually or by reference to an area – or groups of trees or woodlands;**

(2) **that area and group orders only protect only those trees that were in existence at the time the order was made;**

(3) **that new area orders provide protection only until they are confirmed, at which time they must be converted into orders specifying the trees to be protected either individually or as groups;**

(4) **that existing area orders, already confirmed as such, cease to have effect after five years; and**

(5) **that woodland orders protect all trees, of whatever age and species, within the specified area, whether or not they were in existence at the date of the order.**

Do consultees agree?

Number of responses

15.40 Total: 47 (16 in agreement, 16 in agreement with (1), (3) and (5), 12 equivocal responses and 3 others).

Responses in agreement (without further comment)

15.41 Keith Bush, Mark Chester, Lawyers in Local Government, Planning Inspectorate (PINS), National Trust, Newport City Council, Monmouth Town Council, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Julian Morris, Merthyr Tudfil CBC, Institution of Civil Engineers Wales, Jon Brewin (Wrexham CC), The Law Society, PEBA, Huw Williams (Geldards)

Responses in agreement (with additional comment)

15.42 *CLA:* Yes. However, we would add that the presence of a TPO tends to lead to an absence of trees or woodland management for fear of enforcement action. This often leads to neglect and degradation of the woodland's so-called "protected" status.

15.43 *National Grid:* Although National Grid seeks to avoid damage to protected trees, there can be occasions when works to the national electricity of gas network leave no other option. The conversion of area orders into individual or group protection is likely to help with the operation of the system.

Responses in agreement with (1) to (3) and (5)

15.44 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Ceredigion CC, Carmarthenshire CC, Pembrokeshire CC, Neath Port Talbot CBC, Rhonda Cynon Taf CBC:* No. 4 – the provision of existing area orders ceasing to have effect after 5 years – would not stand up to scrutiny in the context considered (para 15.44).

Where a site is proposed for development and an area order is used on a 'precautionary basis to protect all trees on a large site on which development seems likely'; any planning approval may not commence for up to five years (a standard condition of timescale); as such a developer could wait until the 'last minute' to commence the development, by which time the Area TPO may become ineffective before any development is completed, allowing all trees to be removed before they can then be protected by individual or group orders as appropriate.

It is advised that the area condition is either removed; or the time limit is omitted, as it is not sustainable in terms of its more common use.

15.45 *Allan Archer:* I have some reservations about aspects of this proposal. With regard to (4) – I have concerns about existing area orders ceasing to have effect after 5 years in the context mentioned in para 15.44 (i.e. where served on a precautionary basis on sites where development seems likely). In such cases any planning approval for development may not commence for up to five years (a standard condition of timescale); as such a developer could wait until the 'last minute' to commence the development, by which time the Area TPO may become ineffective before any development is completed, with a potential gap during which all trees could be removed before they can then be protected by individual or group orders as appropriate. To take account of this scenario, I suggest the five year time limit is not sufficient and should be reconsidered.

15.46 *Torfaen CBC:* Yes, but with regard to (4), there are resource implications for TCBC and probably other LPA's. It would be better to introduce the new regime for all new area TPO's that are made, and leave existing ones as they are, but encourage their gradual conversion to individual or group TPOs through Government guidance.

15.47 *POSW South East Wales, Caerphilly CBC:* Yes. but with regard to (4): this would place a heavy burden on LPAs that have very few employees, often no more than one, responsible for making TPOs and for providing advice on applications to carry out works to protected trees. That lack of resource is unlikely to get better, and it would be preferable to introduce the new regime for new area TPOs as specified in (3), and leave existing ones as they are, but encourage their gradual conversion to individual or group TPOs through Government guidance

15.48 *Blaenau Gwent CBC:* (1) Agree; (2) Having regard to the stated difficulty in defining a "tree", how does this provision apply in practice? The purpose of area/group TPO is to recognise the value that the group/area makes. Natural regeneration plays a part in that process. To exclude subsequent specimens from the TPO introduces a burden on the LPA to re-survey the TPO to add trees that appear on site after initial service. (3) Agree. (4) Strongly disagree. There should have to be a material change in circumstances to justify the expiry of the TPO e.g. disease. Many LPA's no longer have an arborist – if implemented this will result in the loss of important trees as capacity issues will dictate that TPO's will not be resurveyed once declared. (5) Agree.

15.49 *Bridgend CBC:* Yes to 1) 2) 3) and 5) but No to 4) as LPAs do not have the resources to review orders after 5 years.

15.50 *Cardiff Council*: If old area TPOs run out after 5 years, it could result in swathes of important trees being lost. There isn't the administrative capacity to review such TPOs.

Equivocal responses

15.51 *Barry Town Council:* (4)/(5) disagree, believe this should remain in effect until challenged as it would create an unnecessary burden of work.

15.52 *Andy Lederer, Chartered Foresters:* Agree with proposal point 1. However, a couple of specific queries about points 2, 3 and 4 concerning the conversion of area orders to individual tree or group orders…

(a) Who would be responsible for doing this – the Planning Authority or owners of the relevant land? If the former would it be a 'desk operation' only, or would it involve site visits for verification? If the latter then presumably this is going to be quite costly in terms of time/expense.

(b) If the relevant land owners are to be responsible for this then what if it doesn't get done? It is my personal experience that often where housing development has encroached on areas with trees the owners of the houses don't actually want the trees which, over time, tend increasingly to be seen as a physical danger. In such scenarios even if compulsory replacement planting has been carrried out after felling mature trees this doesn't necessarily mean that you end up with viable replacements in the long term. T hus in such situations I fear that any system that does not protect existing and future trees almost inevitably, over time, tends to lead steady incremental loss of trees.

…which is surely why (point 5) woodland orders, protecting existing and all future trees, are so important, especially where housing development abuts woodlands.

15.53 *Association of Local Government Ecologists:* It is not entirely clear within the list whether woodland TPOs are still proposed to be able to be made. As this is the only type of order that protects all trees no matter the age, which is important to ensure woodlands are able to renew and function ecologically, it is essential that this type of order continues to be able to be made. As we read the list it appears that it is intended to move forward with 'area' TPOs only (that encompass woodland and group TPOs) with these becoming individual or group TPOs. We do not believe that this would provide adequate protection to woodlands if point 5 in the list does not apply to such area or group TPOs.

We would have some concern in relation to resource implications if existing area orders have to be revisited and confirmed within 5 years.

15.54 *Mark Mackworth-Praed:* I agree with these proposals, but the words "or woodlands" should be added at the end of clause (3) – quite often sites where Area TPOs are made include copses, small woodlands or woodland shaws, within which the trees are too numerous to be counted and specified either as 'individuals' or 'groups' (the latter of which under the current model order have to be enumerated by number and species). So the Area TPO should be capable of capturing such features on confirmation.

15.55 *Arboricultural Association:* (1) Yes

(2) Yes

(3) No – There is a potential for instances to occur where access to land for surveying trees has been denied by the owner, and although rights of access in such circumstances are conferred by section 214 of the TCPA 1990, it may not always be expedient to exercise those powers. In these circumstances the maintenance of an 'area' order can be justified. Also, it is recognised that area orders are in a number of cases used on a precautionary basis to protect all trees on a large site on which development seems likely – seeing as a number of these sites are "banked" it is

entirely possible that the circumstances will not have changed within 6 months of the order being made so it might simply be unrealistic to survey the trees to convert the protection to individual trees or groups of trees.

(4) No – This would require many local authorities to review a large number of TPOs in a short space of time, or risk the protection afforded to those trees being removed. Budgetary constraints mean that resources are not readily available to local authorities for such an undertaking. If such a requirement was to be introduced then a grant should be made available to local authorities in order to carry out an 'area' TPO review program.

(5) Yes

15.56 *London Tree Officers Association:* (1) Yes

(2) Yes

(3) No – It is recognised that area orders are applied as a precautionary measure in cases where development appears likely. Due to the nature of development sites, it is possible that circumstances will not have changed within the 6 month timeframe. It would be unnecessarily burdensome for Local Authorities to survey trees with a view of converting them to individual trees or groups, where access is not. There are circumstances where an area designation is considered the most appropriate form of protection for sites that do not fall comfortably in the other designations.

(4) No – This would require many local authorities to review a large number of TPOs where resources are already under pressure. Surveying on this scale would not be possible for officers without sufficient and ring-fenced funding.

(5) Yes

15.57 *Pembrey and Burry Port Town Council:* The Committee feel that it would be better to make certain there would be provision for making tree preservation orders rather than assuming it would.

15.58 *Central Association of Agricultural Valuers:* We disagree with provision five. To protect all trees within an area regardless of their value, or lack of, is not a practical approach and will not help ensure active woodland management to the benefit of protected trees.

15.59 *RTPI:* While it is good to reinforce the group protection, it may be difficult to enforce point (2) covering area / group orders regarding those in existence at the time of the order unless explicitly surveyed / recorded and tagged.

With respect to (4) – we have concerns about existing area orders ceasing to have effect after 5 years in the context mentioned in paragraph 15.44 (i.e. where served on a precautionary basis on sites where development seems likely). We would suggest that the five year time limit is not sufficient.

15.60 *Canal & River Trust:* While we welcome clarification of how area orders should be used, it is unclear what the difference is between such orders and those covering "a

woodland". The new Bill should also clarify the difference, perhaps by reference to a cut-off point which would be the maximum size for an area order and the minimum size for a woodland order

15.61 *Woodland Trust, Ancient Tree Forum:* A planning authority may make an order to preserve "trees, groups of trees or woodlands". We do not consider that any of these options, singly or in combination, adequately provide the means to protect the distinct qualities of principally open grown, scattered trees in parkland or wood pasture where a continuity of trees of all ages should be present to sustain the feature and habitat. The existing designations and the current, and proposed, restrictions and or exemptions applicable to their use all have shortcomings which provides no designation fit for the purpose of protecting wood pasture and parkland comprehensively.

An alternative may be to designate this type of habitat as a special type of Conservation Area without the size exemption but with the proposed power to require replacement planting by condition. This may have merit in a designed landscape where there are also heritage artefacts or buildings but is less useful for those sites without a strong design influence or man-made heritage assets. In our experience Tree Officers have seemed reluctant to engage with CA designation for valuable tree sites due to the association with and implications for built heritage. However, it falls short of protecting the entire parkland habitat.

Without a bespoke protection for wood pasture and parkland, different designation/types of TPO might be applied according to different circumstances. In this situation we see the value of Area

Orders and would like to see them given legitimacy and given a permanent footing. It would allow a LPA to quickly make an Area Order on a site which is threatened without necessarily needing to survey each and every tree. This option might present the least burden to them. However, the area order in the current proposal explicitly restricts protection to those trees present at the time of making the order, limiting its effectiveness in protecting wood pasture in particular

More importantly it is vital to protect the overall habitat as in woodland. Woodland may contain open spaces of 20% of the area or more. One would not expect that the protection would only be related to the trees present and that the open space would be vulnerable to damage or loss. In the case of wood pasture and parkland the space between the trees is mostly a greater proportion, however it is integral to the value and distinctiveness and as valuable as the trees themselves.

Our preferred option would be to have a designation specifically for wood pasture and parkland. This would be a variation on the existing woodland designation and protect all trees and areas of developing young trees (scrub) of whatever size and species and their setting or associated habitat within an area delineated on a plan. The area would be more widely drawn than the boundary of other types of woodland, not necessarily restricted to land ownership and specifically encompass grassland surrounding the trees and be informed by historic extent. Of course there would be no duty on the LPA to grant consent according to good forestry as with a woodland order nor a direction to replant but we would want the LPA to have the power to condition replacement planting on application or in the management plan. This would

allow and encourage entirely different advice for management plans for this habitat such as controlling regeneration if there was too much or encouraging grazing by wild deer or other large herbivores.

We therefore would modify the proposals as follows:

(1) That TPOs can be made to protect trees specified individually or by reference to an area, groups of trees, woodland, or wood pasture and parkland (including traditional orchards). We welcome the recognition of the area designation in law as it a valuable designation as explained under 3)

(2) Agree subject to 3) below

(3) Disagree. Propose instead that new area orders may be confirmed as such.

(i) We agree that area orders are a valuable designation which permits a local authority to rapidly institute control over tree felling/works where there is an imminent risk and there are a substantial number of trees or access to survey is constrained. Additionally, for a variety of reasons it may not be feasible to survey, serve and confirm orders within 6 months.

(ii) Without a new designation of wood pasture and parkland, then an area designation may be the next best option to at least protect the existing tree element of the habitat- as proposed at (2) above. In that case, then the order must be able to stand in perpetuity after confirmation as with other orders. But in the case of an area order relating to wood pasture and parkland, that in these limited situations, we would request that protection extends to trees of whatever size and species.

(4) Disagree. Existing area orders should remain in force. It is certainly desirable to review area orders, particularly very old ones, or those where there has been great change, but to be mandatory may be burdensome to already stretched LAs and not achievable within the timescale proposed. This might lead to many important trees suddenly loosing protection, or diverting scarce resources leaving unprotected trees and woodlands where there is a clear threat or priority. A phased requirement commencing with the oldest, assisted by specific funding might be a better way forward.

That woodland orders and orders that relate to wood pasture and parkland, orchards and ffidd or coedcae protect all trees of whatever size and species within the specified area whether or not they were in existence at the date of the order. (see also our response to Q 15-8 where it is important to protect trees for continuity of habitat).

Other comments

15.62 *Sirius Planning:* Provision should be made for the need for reasonable evidence to support each TPO, including accurate mapping.

15.63 *Monmouthshire CC:* Clarity needed on the fact that after the 6 months (and lapse of the unconfirmed order) that a TPO can still be made

15.64 *Barratt & David Wilson Homes South Wales:* The Planning Code should confirm the definition of a woodland TPO.

CONSULTATION QUESTION 15-4.

We provisionally propose that it should be clarified that the making of a tree preservation order is to be notified to the owners and occupiers of any parcel of land on, in or above which is located any part of any of the trees protected by the order. Do consultees agree?

Number of responses

15.65 Total: 40 (37 in agreement, 2 equivocal responses, and 1 in disagreement).

Responses in agreement (without further comment)

15.66 The Law Society, Neath Port Talbot CBC, Pembrokeshire CC, Planning Inspectorate (PINS), National Trust, Newport City Council, Monmouth Town Council, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Ceredigion CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Institution of Chartered Foresters, Institution of Civil Engineers Wales, Pembrokeshire Coast NPA, National Parks Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, POSW, Torfaen CBC, RTPI, Bridgend CBC, Canal & River Trust, Mark Chester, Lawyers in Local Government, PEBA, Huw Williams (Geldards), Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

15.67 *Julian Morris:* Extending the notification of TPOs and clarifying that the protection extends to the tree, not the ownership on which its stem stands, is in my view a good idea, but an appropriate definition will need to be found to define its protected extent.

This is a sound principle, but some form of rules on the defining of the "land on, in or above which is located any part of any of the trees" will be needed, given that tree roots can extend unseen radially for 2 or 3 times the height of a tree. Notification of all the affected owners will not be possible until the area occupied by any part of the tree has been settled upon.

The current means of defining Root Protection Areas in BS5837 is inadequate in this regard because it requires the arboriculturist (presumably the one advising the LPA

on a would-be TPO has to modify the radius and shape of a default circular RPA to reflect likely root distribution. It unfortunately does not yet cover the larger areas required for veteran trees as defined by the Ancient Tree Forum, and is also deficient in several other fundamental ways. The raw definition of RPA in BS5837 is " layout design tool indicating the minimum area around a tree deemed to contain sufficient roots and rooting volume to maintain the tree's viability, and where the protection of the roots and soil structure is treated as a priority" whereas what is required is absolute protection rather than priority protection.

The BS goes on that the RPA shape and extent should be determined by a) the morphology and disposition of the roots, when influenced by past or existing site conditions (e.g. the presence of roads, structures and underground apparatus); b) topography and drainage; c) the soil type and structure; d) the likely tolerance of the tree to root disturbance or damage, based on factors such as species, age, condition and past management. This is probably too much detail for primary legislation but could be accommodated in Regulations.

There is an even more fundamental difficulty of using the RPA definition, it is based on leaving just enough rooting volume now, but there is no doubt that in almost every case the tree roots will go beyond it, now and in the future. Protecting the root extent now may be possible by defining the area, but this may not be enough to protect the root extent in the future as the tree grown. It could therefore only be used to identify owners at the time the Order is made, but the protection should not extend only to that area.

I strongly agree, subject to the aforegoing.

15.68 *Arboricultural Association, London Tree Officers Association:* Yes, the AA believes that the wording in paragraph 032 of the PPG (see .gov.uk) sums this up well – "The 'persons interested in the land affected by the Order' are every owner and occupier of the land on which the protected trees stand and every other person the authority knows is entitled to carry out certain works to any of those trees or in relation to the affected land."

15.69 *London Tree Officers Association:* If a local planning authority makes an Order, it will serve notice on people with an interest in the land, inviting representations about any of the trees covered by the Order. A copy of the Order will also be made available for public inspection. Following consideration of any objections and comments the authorities can decide whether or not to confirm the Order.

15.70 *Central Association of Agricultural Valuers:* We agree that the making of a tree preservation order should be notified to the owners and occupiers of the land the tree in on in order that the parties are aware of the order and it may be complied with.

15.71 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum agree in principle that those affected by the provisions of an order, which includes damage to the roots, should be aware of the protected status of trees subject to the detailed wording in regulation being practicable and unambiguous.

15.72 *Keith Bush:* Agree – but perhaps owners and residential leaseholders who border this land should also be publicised, as they could have the right, except for the order, to cut tree branches which grow over the border.

15.73 *Cardiff Council*: Agreed. Could this be achieved by the displaying of a Notice at the site.

Equivocal responses

15.74 *Jon Brewin (Wrexham CC):* It may be more appropriate to notify owners / occupiers of the land on which the tree(s) are contained and all other parties affected or likely to be affected by the trees(s) in question.

15.75 *Monmouthshire CC:* Serving a TPO on the landowner and adjacent landowner generates phone calls from people concerned that the tree is 'nothing to do with them' as it is several kilometres away. Could consider instead a certain distance.

Responses disagreeing

15.76 *Mark Mackworth-Praed:* I don't agree with the proposed arrangement, because this could be excessively onerous on LPAs in the case of a large site (e.g. a large estate or parkland) where an Area TPO has been made as a precautionary or emergency measure – to identify which adjoining properties are overhung by trees on the subject land could be even more time-consuming than identifying all adjoining ownerships. It should be sufficient for the LPA, in addition to serving on the owners/occupiers of the land and persons known to be 'interested' in it (per the 2012 England Regs), to advertise the making of a TPO by means of a site notice or notices, and/or by uploading it to its website.

CONSULTATION QUESTION 15-5.

We provisionally consider that there would be no benefit in bringing works to trees within the scope of development requiring planning permission. Do consultees agree?

Number of responses

15.77 Total: 41 (41 in agreement).

Responses in agreement (without further comment)

15.78 Neath Port Talbot CBC, Monmouth Town Council, Institution of Civil Engineers Wales, Jon Brewin (Wrexham CC), Caerphilly CBC, POSW South East Wales, CLA, Julian Morris, Merthyr Tudfil CBC, Blaenau Gwent CBC, Arboricultural Association, London Tree Officers Association, Planning Inspectorate (PINS), National Trust, Newport City Council, Bay of Colwyn Town Council, Torfaen CBC, Central Association of Agricultural Valuers, Monmouthshire CC, RTPI, Bridgend CBC, Mark Chester, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services,

Lawyers in Local Government, Woodland Trust, Ancient Tree Forum, Keith Bush, PEBA, Cardiff Council

Responses in agreement (with additional comment)

15.79 *Andy Lederer, Chartered Foresters:* I agree that work to trees should not be brought within the scope of development requiring planning permission. This because:

a) as noted, work to trees is often carried out in non-development situations

b) Life is complicated enough (for those wishing to carry out work to trees) already!!

15.80 *Pembrokeshire Coast NPA, National Parks Wales:* Yes. As stated (para 15.57); more often tree works are carried out as an entirely freestanding operation, and there is no overlap with mainstream planning control.

15.81 *Allan Archer:* I agree, as explained in the report, that there is no benefit in bringing works to trees within the scope of development requiring permission.

15.82 *POSW:* Yes. As stated (para 15.57); more often tree works are carried out as an entirely freestanding operation, and there is no overlap with mainstream planning control.

15.83 *Association of Local Government Ecologists:* The only benefit to bringing such tree works into the scope of development would be to ensure that applicants have a clearer path to follow in relation to process and to ensure that relevant information informs their application, e.g. protected species surveys (bats etc). The guidance on this issue and how to deal with biodiversity issues within the current TPO works application procedure is not clear. At present it appears that the planning authority does need to consider such issues when looking at an application for tree works but has no mechanism to require information or surveys to be undertaken to inform the decision and no mechanism, other than a requirement for a method statement, to enforce that measures to protect any such species are undertaken. This makes it difficult for LAs to fully comply with wildlife legislation and can put applicants at risk of falling foul of such legislation. We do not suggest that TPO tree works are brought into the planning process per se but the procedures should be at least brought up to date with other legislative and policy requirements.

15.84 *Barratt & David Wilson Homes South Wales:* We do not consider that works to trees should be brought within the scope of development requiring planning permission.

15.85 *Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC:* Agreed. As stated (para 15.57); more often tree works are carried out as an entirely freestanding operation, and there is no overlap with mainstream planning control.

15.86 *Mark Mackworth-Praed:* I agree there would be no benefit in classifying tree works within the scope of development – completely unnecessary, and would serve no useful public purpose.

15.87 *Huw Williams (Geldards)*: Agree. The proposal will result in greater clarity and certainty and remove the source of dispute around where a tree can be said to be "dying". Also, due to the biodiversity features of dead or dying trees, the proposal seems consistent with the extended definition of "amenity" proposed in Consultation Question 15-2.

15.88 *Rhondda Cynon Taf CBC*: Yes. As stated (para 15.57); more often tree works are carried out as an entirely freestanding operation, and there is no overlap with mainstream planning control.

CONSULTATION QUESTION 15-6.

We provisionally consider that the exemption from the need for consent under a tree preservation order relating to works to "trees that are dying or dead or have become dangerous" (currently in section 198(6)(a) of the TCPA 1990) should be tightened up when the trees regulations are next updated. We consider that the exemption should extend only to the cutting down, topping, lopping or uprooting of a tree, to the extent that such works are urgently necessary to remove an immediate risk of serious harm (or to such other extent as agreed in writing by the authority prior to the works being undertaken). Do consultees agree?

Number of responses

15.89 Total: 45 (40 in agreement, 1 equivocal response, and 4 in disagreement).

Responses strongly in agreement

15.90 *PINS:* Yes. 'Dying' and 'dangerous' in particular are vague terms and open to a wide range of interpretation. Their replacement with a more specific reference is welcomed.

15.91 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum strongly agree with the proposed changes such that the only exemption should relate to works urgently necessary to remove an immediate risk of serious harm, or as otherwise agreed in writing by the LPA. We would wish to see a requirement that appropriate prior notification is given to the LPA wherever possible where exempt work is proposed and where prior notice is not practicable that the LPA is notified of the works within a reasonable time. This is important for keeping a complete record of works for both owner and the LPA to avoid potential future disputes, for tracking losses of trees and the position of species of replacement automatically required.

15.92 *Julian Morris:* I strongly agree.

Responses in agreement (without further comment)

15.93 Caerphilly CBC, POSW South East Wales, Blaenau Gwent CBC, Keith Bush, Lawyers in Local Government, Bridgend CBC, Monmouthshire CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town

Council, National Trust, Newport City Council, Bay of Colwyn Town Council, Torfaen CBC

Responses in agreement (with additional comment)

15.94 *The Law Society:* We agree. The proposal will result in greater clarity and certainty and remove the source of dispute around where a tree can be said to be "dying". Also, due to the biodiversity features of dead or dying trees, the proposal seems consistent with the extended definition of "amenity" proposed in Q15-2.

15.95 *Cynwyl Elfed Community Council:* There is a need to tighten up the felling of trees of this kind and a need for a detailed inquiry (where there is no present danger).

15.96 *Bay of Colwyn Town Council:* The Council agrees but feels that the final phrase "or as agreed by the planning authority" the "or" should be replaced by an "and"

15.97 *Jon Brewin (Wrexham CC):* Agree, (however it's a shame that we are still unable to remove outdated text such as 'topping' and 'lopping' and replace with recognisable terms used within BS3998).

15.98 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC, Allan Archer:* Yes. However care should be taken to ensure that the any amendments still include clarification of prior notification e.g.: Any person proposing to cut down a tree under the exemption is advised to give the local planning authority 5 days' notice, except in an emergency. The burden of proof as to the state of the tree lies with the persons (owner/contractor etc) intending to cut down the tree.

15.99 *Merthyr Tudfil CBC:* Agreed. If the regs are updated at the same time.

15.100 *Association of Local Government Ecologists:* We agree that the exemption should relate to immediate danger rather than dying or dead. Dying or dead trees provide important wildlife habitat and form a natural part of a tree life-cycle and woodland processes. Again, the procedures should take into account the requirements of wildlife legislation.

15.101 *Arboricultural Association, London Tree Officers Association:* Yes, this would reduce ambiguity and bring the Welsh law exemption in line with exception contained within the Town and Country Planning (Tree Preservation) (England) Regulations 2012.

15.102 *RTPI:* We agree with the proposal to tighten up the exemption as set out. However, care needs to be taken to ensure that any amendments still include clarification of prior notification.

15.103 *Canal & River Trust:* We agree to the clarification in 15-6 but would also ask for further guidance to be provided on how "urgently necessary" works are defined – for instance by reference to suitably qualified arboricultural surveyors.

15.104 *Mark Chester:* I agree. Dead trees in a woodland setting with no public access but considerable ecological value are exempt from protection in Wales. this cannot be right!

15.105 *PEBA:* Yes – this proposal helpfully clarifies and tightens up the scope of the exemption.

15.106 *Cardiff Council*: Add 'removal' to the list of exempted operations, since cutting down does not always mean the end of a tree and uprooting isn't always undertaken

15.107 *Huw Williams (Geldards)*: Agree that the advantages of certainty outweigh the prospect of increased applications. The position described in paragraph 15.78 is anomalous and the proposal addresses this.

15.108 *Rhondda Cynon Taf CBC*: Yes. However care should be taken to ensure that the any amendments still include clarification of prior notification e.g.: Any person proposing to cut down a tree under the exemption is advised to give the planning authority 5 days' notice, except in an emergency. The burden of proof as to the state of the tree lies with the persons (owner/contractor etc) intending to cut down the tree.

Equivocal responses

15.109 *Mark Mackworth-Praed:* I support the removal of the exemption for 'dying' trees (as has been done in England), but not for 'dead' trees (nor indeed for removal of dead branches). Whilst the concerns expressed regarding veteran trees are acknowledged, it has to be said that these are generally special cases and overall, in the minority. Even as an experienced arboriculturist, I would have difficulty in determining how long it would be 'safe' to retain a large dead branch on a tree for, before it became 'dangerous', and likewise how long it would be 'safe' to retain a standing dead tree for. In both cases, in any frequented area, the dead branch or dead tree will inevitably become 'dangerous' sooner or later, so why put an administrative hurdle (the need to get consent), and a frequently impossible judgment call, in the way of an eventually inevitable outcome?

Responses disagreeing

15.110 *Central Association of Agricultural Valuers:* We believe that the existing wording is sufficient. Works in the interest of safety should not be discouraged by the law of development control. There is developing case law regarding owners' considerable potential liability for injury and damage from falling trees and limbs. It can often be difficult to assess whether a tree presents an immediate threat as the extent of decay is commonly not always be visible until after the tree has suffered damage and so owners have (and their insurers expect them) to act where they have advice as to potential danger. This may create doubt as to whether or not to take action which could result in an unnecessary safety risk. Where a manager has reason to believe that a tree has become dangerous that should be sufficient to permit reasonable action to remove that danger.

15.111 *CLA:* No we do not agree with the tightening of the definition. Pruning and other tree surgery is expensive and planning authority's must accept their duty to compensate an owner faced with a TPO (other than for the diminution in the land value as currently provided for).

15.112 *Institution of Civil Engineers Wales:* No. The ability for householders to remove dead branches should remain, to enable such branches to be safely removed before falling on and injuring someone.

15.113 *Andy Lederer, Chartered Foresters:* No, I don't necessarily agree with the proposal and think we need to be very careful with any changes to the current regulations, allowing the removal of deadwood potentially dangerous to the public/property. Whilst I appreciate the reasons for this proposal for a change (difficulty in deciding to what extent a tree is dying; unwarranted removal of deadwood from valuable veteran trees) as someone who regularly carries out tree safety surveys I suggest consideration of the following scenario :

Say, for instance, I'm doing a tree safety survey in a wooded public park or urban woodland which is much-frequented by the public, with lots of criss-crossing footpaths and many large trees.

Most of the trees are far from dangerous themselves, certainly not immediately so, but quite a few have decent-sized dead branches quite high up and directly above footpaths, where people picnic and perhaps also over property at the edge of the park/wood. The dead branches look quite stable for the time being and (partly depending on species) not about to fall immediately and perhaps not until there's a strong gale. However, it's pretty obvious that at some point they will fall and when they do someone/property could easily get hurt/damaged if they're not removed pre-emptively as part of the prudent action normally expected of a tree owner or surveyor.

Note that here we're not saying that the trees themselves, in their entirety, pose an immediate risk of serious harm but rather that parts of them – the dead branches, pose a risk that, if not immediate, is certainly very real. And remember that if such dead branches are not removed as a prudent action and someone/something gets hurt/damaged then the legal defence would be quite weak – it was predictable that the branches would fall at some point, and it was perfectly obvious that people walked/picnicked underneath.

There are also, as we know, sometimes other, 'non-emergencey' reasons for deadwod removal – e.g. to reduce windage (sail effect) e.g.in say C.macrocarpa or P. radiata

As I understand it under the proposed change the pre-emptive removal of all deadwood, including potentially dangerous deadwood would not be exempt from the tree protection legislation and would therefore require an application and justification, tree by tree and in detail, to carry out the work.

This would surely :

a) Amount to bureaucratic madness for the tree owners/surveyors and the planning authorities alike.

b) Unjustifiably skew the trade-off between the retention of deadwood for its wildlife conservation benefit and its removal for safety reasons towards the former and away from the latter.

Considering all of the above I strongly suggest that the deadwood exemption is retained, if not for all deadwood then certainly then for that which is potentially dangerous to people and/or property.

CONSULTATION QUESTION 15-7.

We provisionally consider that the exemption from the need for consent under a tree preservation order relating to works that are "necessary to prevent or abate a nuisance" (currently in section 198(6)(b) of the TCPA 1990) should not be restated either in the Bill or in the new trees regulations. Do consultees agree?

Number of responses

15.114 Total: 41 (37 in agreement, 2 equivocal responses, and 2 in disagreement).

Responses strongly in agreement

15.115 *Mark Mackworth-Praed:* This is brilliant and long overdue, as the Courts have steadfastly refused over the years to cut this particular Gordian knot. As the paper quite rightly says, very few people are so rash as to rely on the exemption in view of the uncertainties surrounding it, and removing it would also help to prevent tree owners being bullied by aggressive consultants alleging damage to a neighbour's property caused by their trees.

Responses in agreement (without further comment)

15.116 Lawyers in Local Government, Jon Brewin (Wrexham CC), Caerphilly CBC, POSW South East Wales, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Newport City Council, Bay of Colwyn Town Council, Torfaen CBC, Monmouthshire CC, Bridgend CBC, Cardiff Council

Responses in agreement (with additional comment)

15.117 *Andy Lederer, Chartered Foresters:* I agree that, given the difficulty in defining what is/is not a serious nuisance and whether it should be actionable, it may well be best to remove this exemption altogether. As suggested this would force anyone wishing to take action under 'nuisance' (whether the owner of the tree or the complainant) to make a TPO application. Hopefully this would indeed encourage sensible encourage tripartite discussion between tree owner, complainant and planning authority, something that in my experience (even including the latter) does not always happen!

15.118 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC, Rhondda Cynon Taf CBC:* Any amended documentation should ensure that the issue is clearly clarified; not just omit the section 'necessary to prevent or abate a nuisance' as this can still leave the issue unclear. Any new regulations should make it clear that TPO approval will be required for works proposed to 'prevent or abate a nuisance'; this will remove any confusion.

15.119 *Allan Archer:* I agree with the analysis in the report and the recommendation not to carry this exemption forward. However, the wording of the provision as amended needs to avoid any ambiguity.

15.120 *Association of Local Government Ecologists:* We agree to the suggested removal of the exemption in relation to nuisance. Whilst ignorance is not a defence, without a consenting process many people would not consider wildlife if they were doing such works under this sort of exemption, leaving them at risk of committing offences. A consenting process could reduce this sort of risk.

15.121 *Arboricultural Association, London Tree Officers Association:* Yes, the Arboricultural Association agrees that there should be no exemption where the meaning of that exemption is legally unclear. Furthermore local authorities are familiar with balancing the reasons for tree works against the effect on amenity, which is required to decide applications for tree works. This change would remove ambiguity for local authorities, as well as landowners and neighbours affected by trees, whether damage is being caused or might foreseeably be caused, or by mere encroachment.

15.122 *Planning Inspectorate (PINS):* Yes. PINS agree that, as set out in the scenario described in para. 15-77, the vagueness as to what constitutes 'a nuisance' leads to an inconsistent approach to works to protected trees.

15.123 *RTPI:* The removal of the nuisance exemption for adjoining landowners would again, strengthen protection and remove ambiguity.

15.124 *Canal & River Trust:* We welcome the clarification on the position of neighbour rights and the proposed amendment to equalise the position in terms of consent for neighbours with owners.

15.125 *Mark Chester:* I agree. The TPO should over-ride issues such as a branch growing over a boundary.

15.126 *Keith Bush:* Agree – but see answer to 15-4[desirability of notifying neighbours etc of proposed TPOs].

15.127 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum agree with this proposal. To be effective, TPO protection must apply to the whole tree irrespective of land ownership.

15.128 *The Law Society:* We agree that the advantages of certainty outweigh the prospect of more applications. The position described in paragraph 15.78 is anomalous and the proposal addresses this.

15.129 *PEBA*: Yes – this proposal helpfully clarifies and tightens up the scope of the exemption.

Equivocal responses

15.130 *Farmers' Union of Wales:* Members wondered why the exemption could not be clarified with a new description, rather than removing the exemption altogether, which

would offer little or no protection to landowners from some troublesome protected trees.

15.131 *CLA:* This answer requires a degree of practical experience which the CLA does not have.

Responses disagreeing

15.132 *Institution of Civil Engineers Wales:* No. Many trees also overhang buildings where planning permissions have been granted for development in relatively close proximity to a preserved tree. In these circumstances considerable nuisance can be caused by leaves falling onto roofs and being swept into gutters by rain action. These gutters then block up and cause problems. Moss is also encouraged to grow on roofs by overhanging trees, which eventually causes damage to the roof if not regularly removed. These instances are routinely experienced and householders suffer considerable nuisance by them. It should not be an offence to deal with such instances of nuisance by cutting trees back in order to avoid them overhanging buildings. Should a heavy branch fall onto a roof and cause damage, due to being dead, it also does not seem appropriate that an insurance company would become liable for the rectification of such damage simply because the law had precluded action being taken beforehand to remove the dead branch.

15.133 *Julian Morris:* I hold the view that the current 'nuisance' exemption is necessary because it avoids the impossible conflict between someone having trees that are causing a legal nuisance and not being able to do anything about it. If the exemption is to be removed as it probably should, there must be protections built in for the tree owner to compensate him for meeting the cost of an action raised against him by an adjoining tree owner as a result of an otherwise abatable nuisance. Regulation 24 in the 2012 English tree Regulations provides a mechanism but it is essential that a complete review of the wording for Wales ensures that claims can be made as a result of nuisance, including excessive shading, and that the restriction at Regulation 24(4)(a) may have to be lifted for 'nuisance' claims. A primary clarification needed is whether it is the tree owner or the person on whose land the nuisance is occurring that can claim. The use of a *de minimis* level for claims may be a reasonable substitute for having to define what nuisance is substantial enough to constitute 'actionable' nuisance, a matter that otherwise only a court could decide.

CONSULTATION QUESTION 15-8.

We provisionally propose that a new exemption from consent under tree preservation regulations be introduced, to allow the carrying out without consent of works to trees having a diameter not exceeding a specified size, save in the case of trees that were planted as a result of

1) a requirement under section 206 of the TCPA 1990 or

2) a condition of a planning permission or a consent to fell another tree.

(1) **Do consultees agree?**

Number of responses

15.134 Total: 41 (16 in agreement, 2 equivocal responses, and 23 in disagreement).

Responses in agreement (without further comment)

15.135 Institution of Civil Engineers Wales; Merthyr Tudfil CBC; Blaenau Gwent CBC; Lawyers in Local Government; Neath Port Talbot CBC; Monmouth Town Council; PINS; Torfaen CBC; Monmouthshire CC; PEBA

Responses in agreement (with additional comment)

15.136 *CLA:* Yes subject to the following comment. Where TPOs cover a woodland it would be desirable to define what size of trees are covered e.g. over a breast height diameter of say 200mm. Before reaching that size they are not really a "tree" and some management of the understorey may be highly desirable.

15.137 *National Trust:* Support the principle behind the change but wish to consider what size might be an appropriate threshold.

15.138 *Bridgend CBC:* Yes although this doesn't fully recognise protected species.

15.139 *Canal & River Trust:* We welcome the addition of a minimum size exemption to TPOs as well as Conservation Areas.

15.140 *Central Association of Agricultural Valuers:* We agree that, where trees are too small to be of significant value, works to those trees should not require permission.

15.141 *Huw Williams (Geldards)*: Agree that this would be useful and furthers the creation of a consistent architecture of all the topics within Planning Code.

Equivocal responses

15.142 *RTPI:* While this appears a sensible change, we would suggest that further consideration is given to the impact of the proposal, for example in the case of woodland TPOs.

15.143 *Mark Chester:* Care is needed here, as it could easily exclude younger trees, and those which are smaller when mature, e.g. Hawthorn.

Responses disagreeing

15.144 *Jon Brewin (Wrexham CC)*: Disagree: This may facilitate the gradual depletion of a protected woodland.

15.145 *Caerphilly CBC and POSW South East Wales*: No, because it may result in the inappropriate management of woodlands.

15.146 *Julian Morris*: A fundamental decision needs to be made about whether Woodland TPOs are to allow for unending regeneration by saplings, and if so the exemption is unthinkable.

15.147 *Andy Lederer, Chartered Foresters*: What about saplings? I agree on points (1) and (2)...But not in regard to woodlands, where it surely needs more careful thinking through...In the Woodland Order situation remember that

a) Presumably the order has been made because we think the wood is considered to be under some sort of threat or danger of loss, so this is rather different to a lot of commercial forestry.

b) In the natural way of things of the dozens, hundreds or thousands of saplings that start out only a relatively small proportion will win out to grow on to reach 75 or 100mm minimum diameter at which the protection legislation kicks in, and then on to maturity.

c) We're concerned here with the long-term survival of the woodland so it's clear that we need plenty of saplings of all stages of growth, and perhaps especially below the minimum size threshold, in order to ensure an eventual sufficient spatial density of mature trees. This point is quite well covered by the March 2014 government guidelines:

Orders covering a woodland protect the trees and saplings of whatever size within the identified area, including those planted or growing naturally after the Order was made. This is because the purpose of the Order is to safeguard the woodland as a whole, which depends on regeneration or new planting.

However, despite this apparent blanket protection, it's worth considering the following hypothetical (worst case) scenario: A couple have just moved to the countryside and have bought a property that includes some woodland protected by a woodland order. They care a great deal about trees, in fact are almost 'tree-huggers', but lack knowledge of woodlands and how they regenerate. They both like a 'nice, tidy, neat-looking wood' so they get cracking with their clearing saw, clearing large areas of scrub, including swathes of excellent natural regeneration, many many small saplings at various stages of growth, below the minimum size at which protection kicks in. The couple's neighbours think the woodland looks 'really neat' like that and do the same thing in their part of the protected woodland, again always making sure they're only removing saplings below the threshold size.

As a result of these peoples' work the wood does indeed look neat and tidy but, of course, in their enthusiasm, over large areas they've knocked out a whole generation of sub-threshold-sized saplings which would have formed the next generation of 100mm+ diameter saplings, to go on to become mature trees. The effect, if sufficiently large scale, could be similar to letting cattle or sheep into the wood.

As I understand the proposal there would (as now in Scotland) be a partial exemption from the planning consent requirement that would allow clearance of young saplings in a thinning context (i.e. thinning to best stems) but, this apart, small saplings would be entirely unprotected. Surely this would not be a satisfactory situation ?

Of course it's important to be able to thin out small saplings and scrub without fear of prosecution, but in a protected woodland situation (and after all this is not commercial forestry) it's surely also vitally important to retain sufficient to ensure an eventual full stocking of mature trees (open glades apart) throughout the wood. This is perhaps

already covered under 'Intentional/reckless damge to trees', Q15 – 14 below (grazing animals within woods) but nevertheless if you are removing protection for young saplings in a protected woodland you surely must incorporate a clause stipulating that sufficient natural regen. remains to ensure the long term continuance of the woodland.

15.148 *Allan Archer*: I think further thought should be given to this proposal in the case of woodland TPOs as it could have unintended consequences as described below.

Paragraph 15.82 states 'it would be unhelpful to require consent to be obtained for the removal of undergrowth and scrub (which is likely to contain such saplings).' This seems to suggest that removal of saplings ought to be allowed as part of removal of scrub and undergrowth

However, the effect of a woodland TPO is to ensure a cyclical growth pattern that will allow trees to establish naturally to maintain the woodlands indefinitely, with all trees (regardless of size) being protected by the TPO, which in turns produces a diverse, habitat and biodiversity.

Also, providing an exemption for 'removal of undergrowth' in legislation suggests that this is an acceptable approach to woodland management, whereas the practice could, without due consideration, effect other flora and fauna within the woodland, undermining its long term future as a woodland and its habitat and biodiversity potential.

Maintaining the need for TPO approval for all trees regardless of size allows an informed approach to be made in terms of management of individual trees and woodlands.

15.149 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Pembrokeshire CC, Carmarthenshire CC, Ceredigion CC, Rhondda Cynon Taf CBC:* No. Paragraph 15.82 states 'it would be unhelpful to require consent to be obtained for the removal of undergrowth and scrub (which is likely to contain such saplings).'

This statement does not clearly identify whether the undergrowth clearance would include or exclude the saplings; i.e. does it mean: clearing around the saplings to improve development, or removal of the saplings as they are deemed part of the 'undergrowth'.

Secondly; this statement appears to be a contradiction of the purpose of a woodland TPO; where the entire point of a woodland TPO is to ensure a cyclical growth pattern that will allow trees to establish naturally to maintain the woodlands indefinitely, with all trees (regardless of size) being protected by the TPO, which in turns produces a diverse, habitat and biodiversity.

Thirdly; statements such as 'removal of undergrowth' by its very nature in legislation suggests that this is an acceptable approach to woodland management; without due consideration of other flora and fauna within the woodland.

The proposed exemption also fails to distinguish saplings within woodlands; which would not meet the definitions in (1) or (2); and could therefore be removed without

consent, undermining the future of the woodland, its habitat and biodiversity potential. This is a failure to consider species outside of the context of trees themselves; and is not a sustainable approach.

Maintaining the need for TPO approval for all trees regardless of size allows an informed approach to be made in terms of management of individual trees and woodlands. It should be clearly identified in any future legislation that all trees regardless of size within a TPO are protected – whether self-seeded or planted.

15.150 *Association of Local Government Ecologists*: We do not agree that an exemption should be put in place for removal/works to saplings or undergrowth in woodland TPOs. Such trees and undergrowth are an important part of a woodland and the means by which the woodland is renewed. Undergrowth and scrub along with the ground flora form important part of the ecology of a woodland, a woodland is not just the tree canopy. It is therefore important that management works take into account the whole woodland ecosystem not just the trees; else the biodiversity and green infrastructure value may be lost. We would suggest that a consent should still be required to ensure works are undertaken in line with best practice for woodland management.

15.151 *Newport City Council*: No, the size of a tree is not material. Smaller trees may have amenity value (under the new definition of amenity) and the cumulative loss would have significant impact.

15.152 *The Law Society, Huw Williams:* We think this proposal merits further consideration. Situations may arise where woodlands are managed by the practice of regular coppicing. Indeed, the practice could be reason the amenity value of the woodland. There may be merit in considering whether a TPO can give consent generally to such management practices where they will maintain the amenity value of the woodland. An analogy with this suggestion is the listed building partnership agreement, which gives listed building consent to operations specified in the partnership agreement.

15.153 *Keith Bush*: Disagree. It appears inconsistent not to except small trees from the scope of the definition of "tree" for TPOs (see 15-1) but then to allow them to be cut without permission.

15.154 *Cardiff Council:* Disagree. 'Undergrowth' and 'Scrub', and extensive stands of self-seeded trees within woodland can be critically important, not only in terms of 'ecosystem services', but also visually and biomechanically – e.g. undergrowth trees in a copse may provide low level screening or dissipate wind energy that may otherwise hit high-crowned trees. It is perverse to strengthen the protection for trees that are dead, but at the same time allow for removal in some circumstances, of younger trees. We have experienced attempts to degrade TPO woodlands by continued removal of self-seeded undergrowth and unless the TPO system acknowledges the importance of young trees, it will always be weighted towards the mature and senescent trees, resulting in an imbalanced age class structure.

Responses strongly disagreeing

15.155 *Mark Mackworth-Praed:* Sadly, the proposed exemption for saplings is not such a good idea, and actually quite dreadful. As I posted on UKTC recently, the disastrous

1976 Lord Denning obiter dictum in *Kent County Council v Batchelor* that in a woodland a tree should be "something of around 7 to 8 inches in diameter" effectively gave that landowner carte blanche to "fillet" all his woodlands by removing everything below that size - I still have "before and after" air photos that show the results, with all the woodland floors ploughed and sown with cereal crops. It wasn't until 1991 that Maidstone BC managed to get the High Court to effectively reverse that by preventing its continuation. It's bad enough that TPOs can only protect the 'trees' in a woodland – they can't protect the shrubs or ground flora – but at least following Bullock and Palm we now know saplings of any size are protected, hence ensuring the woodland's regeneration and continuation. But then to exempt saplings from the TPO – this would immediately reverse the benefit of those decisions for the protection of woodlands. Sorry, but simply crazy.

15.156 *Arboricultural Association:* (1) & (2) - No, the Arboricultural Association is extremely concerned that after proposing to clarify that 'woodland' TPOs should apply to all trees within the woodland, irrespective of their age [15-3 (5)], this consultation then goes on to propose that there should be an exemption for removal of saplings from a woodland, ostensibly because it may be a nuisance to make an application when a landowner might want to clear undergrowth that may or may not have saplings growing within it. It also implies that, as a default position, naturally growing "small saplings" in woodland are less important than those planted as either a requirement under section 206 of the TCPA 1990 or as a condition of a planning permission – the Arboricultural Association does not support such a stance.

15.157 *Arboricultural Association, London Tree Officers Association:* strongly opposes this proposal which would disrupt the whole purpose of a 'woodland' TPO. An exemption of this nature would threaten trees protected under a woodland designation. This would potentially allow damaging management operations that would have an adverse impact on developing trees and the general ecology of the environment. Such natural regeneration is vital for the survival of any semi natural woodland, but particularly so when applied to Ancient Woodland, which is the UK's richest land-based habitat and the home of many threatened species.

Furthermore the Arboricultural Association and the LTOA have not been made aware by their members that the requirement to make an application for removal of saplings is a significant problem, whether to clear undergrowth, or for any other woodland management objective.

15.158 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum strongly disagree with the proposal to allow the removal of small diameter trees. This would prevent the protection of slow growing trees which may be of some age or rare but small growing species. It would be extremely detrimental in those cases where the designation has been used to protect habitat and where it is fundamental to have regeneration of saplings for continuity of habitat and sustainability. The whole purpose of TPOs in these circumstances is to give additional protection to that provided by the generality of a felling licence.

The Woodland Trust is aware in its casework where additional TPO control over all trees including saplings to protect woodland might be desirable. Many ancient woodland edges have been incur`porated into gardens where felling licence controls

do not operate; woodlands that have been lotted up and sold off to individual buyers who may use their quarterly allowance to remove 5 cu m per calendar quarter which might rapidly result in the loss of the entire woodland; woodlands used for recreational purposes which may result in the removal of or damage to small trees e.g. paintballing. In these circumstances regular removal of saplings can quickly lead to the loss of habitat and over time the area becomes entirely changed and the habitat is lost. Woodland TPOs currently are the only means of controlling this kind of degradation and loss.

It should be possible for LPAs to agree a long term management plan with owners that would allow for the appropriate management of the trees, area and/or woodland so that the values for which it was protected are preserved without theoretical risk of prosecution which we would consider to be extremely low given that prosecutions should only proceed in the public interest

It might be an acceptable exemption to apply to area orders applied on sites that are not wood pasture and parkland. It would be a point of differentiation and might address the criticism that trees of insufficient amenity might be included i.e. they are 'blanket orders'. It would make them similar to Conservation Area control. We would support the exemption for this more limited application. If this were included, then the size exemption should ideally be the same as in Conservation Areas.

CONSULTATION QUESTION 15-9.

We provisionally propose that a provision should be introduced in the trees regulations (along with an appropriate enabling provision in the Bill) to enable a certificate of lawfulness to be issued in relation to proposed works to a tree.

Do consultees agree? And what might be the resource implications of this proposal?

Number of responses

15.159 Total: 40 (21 in agreement, 5 equivocal responses, and 14 in disagreement).

Responses in agreement (without further comment)

15.160 Caerphilly CBC, POSW South East Wales, Torfaen CBC, Neath Port Talbot CBC, Bay of Colwyn Town Council, Huw Williams (Geldards)

Responses in agreement (with additional comment)

15.161 *Jon Brewin (Wrexham CC):* Agree in principle but would need more detail regarding the proposed process.

15.162 *Institution of Civil Engineers Wales, CLA:* Yes. Unable to comment on the resource implications.

15.163 *Blaenau Gwent CBC:* Do not object on the basis that it is unlikely to be a common form of application but question whether there is evidence this is an issue or when this type of application would be used given exemptions for urgent works.

15.164 *Lawyers in Local Government, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services:* No objection but determining a Certificate would be work for the tree officers rather than the lawyers of a LPA.

15.165 *Keith Bush:* Agree in principle. But there needs to be further consideration of the effect on planning authorities' resources.

15.166 *RTPI:* The issuing of a Certificate of Lawfulness would again clarify position in terms of whether permission is required.

15.167 *The Law Society:* We agree that this would be useful and furthers the creation of a consistent architecture of all the topics within Planning Code.

15.168 *Central Association of Agricultural Valuers:* We agree that it would be useful for an applicant to have the option to gain a decision on the lawfulness of proposed works to protected trees that could be relied on in any later enforcement action.

15.169 *Planning Inspectorate (PINS):* This seems to be a sensible provision which would help those with protected trees on their land. As PINS is not in a position to comment on the resource implications of processing such certificates it cannot assess whether the benefit would be worth the resource expenditure.

15.170 *Newport City Council:* Yes, gives certainty through a recognised process. However a time limit may be required to reflect the fact that trees grow.

15.171 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum would support this proposal if it reduced bureaucracy for both applicant and the LPA and simplified and reduced time for agreement between parties to works.

15.172 *Keith Bush*: Agree in principle. But there needs to be further consideration of the effect on planning authorities' resources.

15.173 *PEBA:* Yes - a sensible proposal in principle – others are better placed to comment on the resource implications.

Equivocal responses

15.174 *Allan Archer:* I agree that this proposal would provide a mechanism to establish the lawfulness of proposed works. However, I question whether a more formal certificate is really necessary. I would have thought that the question of the lawfulness of operations to trees subject to a TPO could reasonably easily be sorted out through discussion with the planning authority's specialist officer and confirmed through a pre-application service. I do not imagine that a planning authority would be likely to come to any different conclusion via a certificate of lawfulness process.

15.175 *Arboricultural Association:* No, whilst there may be some merit to a proposal for a TPO specific 'certificate of lawfulness' in order to reduce uncertainty, the Arboricultural Association has not been alerted by members that the current status quo is no longer working. Local authorities are under increasing budgetary pressure and it seems unnecessary to increase bureaucracy and administration costs without a significant problem being identified.

15.176 *Canal & River Trust:* We already consult with local authorities where we plan works which we believe to be exempt (several dozen authorities a year in England and one or two in Wales) but discussions are based solely on the desire of the local tree officer to engage, which is an indication of their view on the application of the exemptions. Formalising such discussions with a Certificate would seem to be effectively consenting by an alternative route, as the only reason to do so will be because the tree officer expresses concerns about the application of the exemption and wishes to see changes before such a certificate will be issued. This says much about the subjectivity in determining exemptions at present. We would prefer that guidance on the application of exemptions was clarified to the point that such Certificates would rarely be needed.

15.177 *Association of Local Government Ecologists:* We are unclear when a certificate of lawfulness would be appropriate to be applied. Further detail would be needed to provide full comment.

15.178 *Julian Morris:* I have no view on this.

Responses disagreeing

15.179 *Andy Lederer, Chartered Foresters:* Not sure I agree on the need for this change, which would surely simply add more bureaucracy.

15.180 *Merthyr Tudfil CBC:* Disagree. This would introduce more bureaucracy.

15.181 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Pembrokeshire CC, Carmarthenshire CC, Ceredigion CC & Rhondda Cynon Taf CBC:* No. The current TPO application can be used in the same way without the need for additional resources or certification. Any person applying for a TPO application should have a response from the local Authority within 8 weeks that clarifies whether the work is approved, refused or exempt from requiring TPO approval.

Where the works are identified by the LPA as being exempt from requiring TPO approval; the correspondence clarifying this should be sufficient, as it is an official response by the relevant authority. The legislation also allows the applicant the right of appeal to the Planning Inspectorate where the LPA has not issued a decision within either eight weeks or two months; which should also ensure that official notification is provided in all cases.

The issue with a certificate of lawfulness in this instance is that it is assigned to a living structure that will grow and change; will the Certificate of lawfulness be extant in perpetuity or will it require regular reapplication as the tree changes or the adjacent landscape changes? Will there be a cost? Would any cost be required each reapplication?

There appears to be a level of unreasonableness to a certificate of lawfulness to a tree; that would not stand up to scrutiny.

15.182 *POSW:* There was a small number of Authorities which had no objection to issuing LDC for works to TPOs similar to 14-9 above.

15.183 *Mark Mackworth-Praed:* I'm not sure that there is evidence of a sufficient need to warrant introducing the system proposed – in present circumstances, when LPA resources (and particularly Tree Officers) are so stretched, this I believe would create an excessively burdensome system out of proportion to any need for it. In practice, if a Tree Officer has informally advised someone that what they're proposing to do is exempt, then the LPA will be extremely unlikely to pursue a prosecution for the work, even if the TO has later forgotten what he/she said, or changed his/her mind. Generally nowadays, TOs tend to confirm informal advice by email anyway, so there is normally a safeguard/paper trail in any event, without introducing a formal mechanism.

15.184 *London Tree Officers Association:* No. There would be no benefit of introducing a TPO specific 'certificate of lawfulness'

15.185 *Monmouthshire CC:* Disagree with this approach as it is too onerous and has huge resource implications for LPAs

15.186 *Bridgend CBC:* No. It is an unnecessary additional burden on LPAs where an application to carry out works to a TPO is sufficient. If taken forward, minimal [resource implications], provided that the application is supported by sufficient details of the proposed works and the application fee covers the cost of processing the applications.

15.187 *Cardiff Council*: Disagree. The administrative burden for many officers dealing with TPOs is already overwhelming and this will add another layer of complication to an already over-complicated system.

CONSULTATION QUESTION 15-10.

We provisionally propose that planning authorities should be required to acknowledge applications for consent under the trees regulations. Do consultees agree?

Number of responses

15.188 Total: 42 (40 in agreement, and 2 in disagreement).

Responses in agreement (without further comment)

15.189 Jon Brewin (Wrexham CC), Institution of Civil Engineers Wales, Caerphilly CBC, POSW South East Wales, CLA, Cynwyl Elfed Community Council, Merthyr Tudfil CBC, Blaenau Gwent CBC, Carmarthenshire CC, Monmouth Town Council, Planning Inspectorate (PINS), National Trust, Newport City Council, Bay of Colwyn Town Council, Torfaen CBC, Monmouthshire CC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Mark Chester, Lawyers in Local Government, Keith Bush, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, PEBA, Huw Williams (Geldards)

Responses in agreement (with additional comment)

15.190 *Andy Lederer, Chartered Foresters:* I agree with this proposal as it reassures applicants that the thing is 'in process', in the system. Cornwall Council does this routinely anyway.

15.191 *POSW, Ceredigion CC, Pembrokeshire Coast NPA, Pembrokeshire CC, National Parks Wales:* Yes. This can be simply implemented as a validation process; whereby the application is assessed and if acceptable notification is proved to the applicant. If the application is not acceptable (missing key information) then the applicant can be contacted requesting for the information in order to process the application.

15.192 *Julian Morris:* I agree. A time limit for response should be given, and a mechanism put in place as to what happens if acknowledgement is not made. I would go further and say that there should be a statutory timescale for determining TPO applications, and a clear deemed refusal at the end of this. The failure to acknowledge receipt of an application should keep the clock running from the date of the application rather than any re-application resulting from LPA failure to acknowledge.

15.193 *Mark Mackworth-Praed:* Yes, definitely LPAs should be required to acknowledge TPO consent applications, and furthermore should be required to state the date of expiry of the 8-week determination period in such acknowledgments, so that the applicant can be certain of the date on which he can appeal on non-determination if he hasn't had a decision.

15.194 *Arboricultural Association:* Yes, the Arboricultural Association believes it is reasonable that applicants receive acknowledgement of an application under a TPO being received. However, the AA is aware that some local authorities do not follow this practice in England and wonder if there is merit in leaving this to the discretion of the local authority, rather than making it a mandatory requirement.

15.195 *Allan Archer:* I agree that this would build existing good practice into regulations.

15.196 *Central Association of Agricultural Valuers:* It would be helpful to an applicant to have receipt of their application acknowledged. It would also be helpful if such an acknowledgement included an anticipated time frame for response.

15.197 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum agree with this proposal. It is good practice being written into law. However, there must be guidance as to the information necessary that should be provided with the application to allow the LPA to effectively and efficiently consider the proposed works.

15.198 *Rhondda Cynon Taf CBC*: Agreed. This can be simply implemented as a validation process; whereby the application is assessed and if acceptable notification is proved to the applicant. If the application is not acceptable (missing key information) then the applicant can be contacted requesting for the information in order to process the application.

Responses disagreeing

15.199 *London Tree Officers Association:* The LTOA disagree that it should be made a requirement, preferring the practice of leaving this to the discretion of the local authorities as set out in paragraph 076 of the Planning Practice Guidance:

> The authority should acknowledge receipt in writing, confirming the date on which the complete application was received and the date after which an appeal may be made against non-determination. The authority can briefly explain whether or not it will be inviting comments on the application from local residents, authorities or groups, and whether it intends to visit the site.

15.200 *Cardiff Council*: Disagree. TPO applications are typically acknowledged, formally or informally and this requirement may add unnecessary administrative pressure.

CONSULTATION QUESTION 15-11.

We provisionally propose that the requirement to plant a replacement tree following the felling of a dangerous tree or following unauthorised works should be limited to the planting of a tree of appropriate species at or near the location of the previous tree (rather than, as at present, in precisely the same place). Do consultees agree?

Number of responses

15.201 Total: 46 (39 in agreement, 6 equivocal responses, and 1 in disagreement).

Responses strongly in agreement

15.202 *Mark Chester:* Yes, a really good idea!

Responses in agreement (without further comment)

15.203 Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Carmarthenshire CC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Planning Inspectorate (PINS), Home Builders Federation, Newport City Council, The Law Society, Canal & River Trust, Lawyers in Local Government, Keith Bush, Barratt & David Wilson Homes South Wales, Cardiff Council

Responses in agreement (with additional comment)

15.204 *Jon Brewin (Wrexham CC):* Agree. It would be sensible to state that the replacement tree be planted 'as close as is reasonably practicable to the location of the tree removed'.

15.205 *Pembrey and Burry Port Town Council:* The Committee considered whether it would be appropriate for the maturity of the replacement trees be considered also, as older trees may be more appropriate than saplings depending on what they are replacing.

National Trust: Support the principle perhaps the location be subject of agreed location plan?

15.206 *Andy Lederer, Chartered Foresters:* I agree with this proposal entirely.

Position of tree: In my experience quite often the reason the mature tree has had to be felled in the first place was because of its exact location, say extremely close to a building or on the very edge of a break of slope. Suitable wording on the position of replacements might be 'within several metres' of the tree removed, or 'in the immediate vicinity of the tree removed.

Tree species: It is also sensible to allow more flexibility on the tree species planted as a replacement. Again, this is because very often the tree that had to be felled inappropriate for that position in the first place – e.g. too large as a mature tree or unsuitable for ground conditions at the site. Altogether the system as it currently operates is far too inflexible

15.207 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Pembrokeshire CC, Ceredigion CC:* Yes. However, care should be taken to ensure that the condition does not allow for misinterpretation. For example, if the tree is on the eastern side of a driveway 'at or near the location of the previous tree' would be interpreted as needing to be planted on eastern side of the driveway; which may be in proximity to features that may be detrimentally impacted by the tree in the future. Whereas a more suitable location may be on the western side; that is unlikely to cause future issues and would not impact on the overall amenity value of the tree.

The use of a statement such as 'as close as is practicable' allows for a broader interpretation of the planting; that is unlikely to lead to claims of future nuisance. An example of a condition would be: Replacement of 1 no tree to be planted as close as is practicable to the original location and planted in the first planting season following the felling hereby authorised

15.208 *Arboricultural Association, London Tree Officers Association:* Yes, the Arboricultural Association believes this is a more reasonable approach to tree replacement, as the costs associated with stump removal which may be necessary to replace a tree in exactly the same place can be substantial, and there will be circumstances, for example compliance with way leaves etc when it will simply not be possible to plant in the very same position. However, the AA would not wish to see circumstance whereby the applicant or agent was able to successfully appeal against a reasonable requirement of the local authority to plant the replacement tree(s) in the same garden, particularly if the alternative suggested by the applicant/agent diminished the potential (visual) amenity value of the replacement(s). The LTOA suggest a similar wording to section 206 of the Town and Country Planning Act 1990.

15.209 *Central Association of Agricultural Valuers:* We support this level of pragmatic flexibility.

15.210 *Monmouthshire CC:* 'Appropriate Species' should be up to the LPA

15.211 *Neath Port Talbot CBC:* Agreed, however perhaps consideration should be given to inclusion of the words …at or near the location of the previous tree and as agreed in writing with the Planning Authority.

15.212 *RTPI:* This seems to add subjective issues into the consideration of the location of the replacement tree. Should the location of the tree be subject of agreed location plan?

15.213 *Bridgend CBC:* Yes - to include reference to the size of the replacement tree. The exact location of the replacement tree should be agreed with the LPA.

15.214 *Woodland Trust, Ancient Tree Forum:* In principle the Woodland Trust and Ancient Tree Forum agree with the proposal as it allows for an alternative location for a replacement tree for practical reasons to be agreed by the LPA. However, in the case of Trees of National Special Interest (see other issues at end of document) we consider that where the interest of the tree relates to its exact place or a location close by, that there should be a requirement to provide a replacement in precisely the same place or as near as practically possible. For such trees it is vital that there is an audited trail so that the location of replacement protected trees is retained over time. Where necessary, the replacement tree should have protected status until it reaches the minimum size to fall within the protection of the TPO legislation.

15.215 *PEBA*: Yes – a sensible and practical improvement to the existing law.

15.216 *Huw Williams (Geldards):* Agree that the opportunity should be taken to expressly provide for variations as proposed.

15.217 *Rhondda Cynon Taf CBC:* Agreed. However care should be taken to ensure that the condition does not allow for misinterpretation. For example if the tree is on the eastern side of a driveway 'at or near the location of the previous tree' would be interpreted as needing to be planted on eastern side of the driveway; which may be in proximity to features that may be detrimentally impacted by the tree in the future. Whereas a more suitable location may be on the western side; that is unlikely to cause future issues and would not impact on the overall amenity value of the tree. The use of a statement such as 'as close as is practicable' allows for a broader interpretation of the planting; that is unlikely to lead to claims of future nuisance. An example of a condition would be: Replacement of 1 no tree to be planted as close as is practicable to the original location and planted in the first planting season following the felling hereby authorised.

Equivocal responses

15.218 *Bay of Colwyn Town Council:* The Council feels that this needs strengthening, after all how near is near. As near as possible has been suggested but again it may still be open to abuse. If and only if the protected tree has been felled because it was diseased, its replacement should be planted not only near to its original location but also far enough to eliminate repeating the disease infection. "as agreed by the planning authority" should also be included.

15.219 *Andrew Ferguson:* This is an important change – but it should be subject to agreement with the LPA to ensure that the replacement tree is not planted in a significantly different location which benefits whoever has chopped the tree down and would inhibit the growth of the tree.

15.220 *Julian Morris:* What is currently important is public visibility. The requirement should be worded to emulate this, such that the tree is equally or more visible and/or as close as reasonably practicable to the original?

15.221 *Association of Local Government Ecologists:* We agree that planting of a replacement tree may be better placed and a species better selected for the location; particularly taking into account the space available, green infrastructure or biodiversity requirements of the locality.

15.222 *Blaenau Gwent CBC:* Agree provided the arbiter of "near" is the LPA.

15.223 *Mark Mackworth-Praed:* Yes, indeed, "at or near" is sensible and practical (and very often is what happens in practice anyway).

However, I think the consultation paper has missed a very important trick as far as replacement planting is concerned, and that relates to replacement planting in woodlands. At the moment, for woodlands, S.206 requires "the same number" of trees to be planted as were removed. The deficiencies of this are obvious, as in the case of major woodland clearance, how can an accurate count of the "number of trees removed" be arrived at? This problem has been the bane of tree replacement enforcement for decades (and I've been banging on about it since the early 1990s), and it came to a head again recently in Distinctive Properties v SofS (Windsor & Maidenhead) – where fortunately the Court of Appeal found for the Secretary of State. What's slightly annoying is that the Government acknowledged the deficiency in its 1994 response to the 1991 consultation (in which I also banged on about it), and said that for woodlands, the requirement would be amended to apply to the area of woodland felled/removed, not to the "number of trees", but sadly, in England's case, this never happened.

Responses disagreeing

15.224 *Torfaen CBC:* No. The term "at or near" is too vague and developers that have purposely cut down a tree/trees in order to develop a site could exploit this by ensuring that a replacement tree is positioned so as to allow a development to be built. Having said that, it is recognised that the existing term "at the same place" is not ideal and in many cases may not be feasible. One alternative could be to require the person replacing the tree to get written approval from the LPA of the location of the replacement tree. If agreement cannot be reached, then it could be open to the LPA to issue a tree replacement notice specifying where the replacement tree should be planted.

CONSULTATION QUESTION 15-12.

We provisionally propose that there should be an explicit power enabling a planning authority to waive or relax a replacement notice. Do consultees agree?

Number of responses

15.225 Total: 36 (35 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

15.226 Jon Brewin (Wrexham CC), Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Julian Morris, Merthyr Tudfil CBC, Blaenau Gwent CBC, CMet Residents Group, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Planning Inspectorate (PINS), Newport City Council, Torfaen CBC, Monmouthshire CC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Mark Chester, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council

Responses in agreement (with additional comment)

15.227 *Andy Lederer, Chartered Foresters:* I agree, this sounds like good sense. There are indeed occasionally instances where it is appropriate to waive/relax a replacement notice.

15.228 *POSW, Ceredigion CC, Pembrokeshire Coast NPA,* Pembrokeshire *CC, National Parks Wales:* Yes. However information should be included in guidance that this will require significant justification; such as changes to the immediate area preventing planting; or the need to vary the condition due to species restrictions etc.

15.229 *Carmarthenshire CC:* Agree. This gives explicit power for LPAs to waive replacement requirement.

15.230 *Arboricultural Association:* Yes, the AA is aware that paragraph 122 of the PPG (see .gov.uk) states that a local authority in England has powers to dispense with the duty to plant a replacement tree. On this basis it may be useful to allow a local authority some discretion to relax or waive a Tree Replacement Notice via an explicit power.

15.231 *London Tree Officers Association:* The LTOA considers that discretion via a formal process is sensible in line with section 206 (2) of the Town and Country Planning Act 1990 'The duty imposed by subsection (1) does not apply to an owner if on application by him the local planning authority dispense with it.'

15.232 *Central Association of Agricultural Valuers:* We agree that a planning authority should waive the power to waive or relax a replacement notice.

15.233 *Woodland Trust, Ancient Tree Forum:* In principle the Woodland Trust and Ancient Tree Forum agree with the proposal. However, in the case of Trees of National Special Interest we consider that, where the special interest relates to its exact place or a location close by, the permission is waived only in exceptional circumstances.

15.234 *Rhondda Cynon Taf CBC*: Agreed. However information should be included in guidance that this will require significant justification; such as changes to the immediate area preventing planting; or the need to vary the condition due to species restrictions etc.

Equivocal responses

15.235 *Mark Mackworth-Praed:* Well, yes, but this goes rather the wrong way in my view – the proposals should really be focussing on tightening up enforcement of replanting, rather than relaxing it! See answer to next question.

CONSULTATION QUESTION 15-13.

Section 209 of the TCPA 1990 provides for regulations be made enabling a planning authority to recover any expenses it has incurred in making and enforcing a tree replacement notice; but no such regulations have yet been made. Would such powers be helpful in ensuring that replacement trees are planted in appropriate cases?

Number of responses

15.236 Total: 40 (35 in agreement, 3 in disagreement, and 2 others).

Responses in agreement (without further comment)

15.237 Caerphilly CBC, POSW South East Wales, CLA, POSW, Julian Morris, Merthyr Tudfil CBC, Blaenau Gwent CBC, Ceredigion CC, CMet Residents Group, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Pembrokeshire CC, Planning Inspectorate (PINS), Newport City Council, Torfaen CBC, Monmouthshire CC, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, Carmarthenshire CC, Allan Archer, Mark Mackworth-Praed, Rhondda Cynon Taf CBC

15.238 Responses in agreement (with additional comment)

15.239 *Pembrokeshire Coast NPA, National Parks Wales:* Yes. Care should also be taken to consider the costs of maintaining the tree if planted by the authority

15.240 *Arboricultural Association, London Tree Officers Association:* Yes, this appears to be a reasonable proposal, as costs have the potential to be high if a landowner is not compliant.

15.241 *The Law Society & Huw Williams (Geldards):* Provision should be made in regulations for recovery of costs. The ability to register a statutory charge is probably the feature of most benefit as it will need to be discharged if the property is ever sold. Unpaid costs should carry interest. We would not underestimate the potential costs of replanting (see, for example, the recent felling of an extensive area of woodland at Amroth in the Pembrokeshire Coast National Park - https://twitter.com/PembsCoast/status/957297369552388103). There would need to be provision for a cost claim to be challenged and referred for determination by a planning inspector if not agreed.

15.242 *Mark Chester:* It could be useful. An indication of fees would be beneficial.

15.243 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum agree with the proposal. This would be particularly valuable where a large tree is

required to be a suitable replacement or special preparation or there are many trees to be replaced and the costs might be substantial. It also allows the community to request the LPA to undertake the works and recover the money in the case of an important tree.

15.244 *PEBA:* Yes – the power to make regulations should be retained for that purpose.

15.245 *Cardiff Council:* Agree. The failure on behalf of those required to plant replacement trees to carry out such planting is a problem and the system for enforcing such is long and complex. If there is a simple and easy method to enforce means by which the Local Authority can recover costs for planting a replacement tree, it should mean that more trees are planted and to a better standard than is currently the case.

Responses disagreeing

15.246 *Central Association of Agricultural Valuers:* We are not aware of any cases where use of such powers would have been necessary.

15.247 *Andy Lederer, Chartered Foresters:* No, I don't agree with this proposal. I don't think the issue raised is sufficiently serious that action need be taken, creating more costs and beaurocracy. I suspect that the vast majority of people do in fact carry out the required replacement planting, even if might take a gentle reminder note from the planning authority.

15.248 *Institution of Civil Engineers Wales:* No. Considered unlikely to be worthwhile.

Other comments

15.249 *Carmarthenshire CC:* Could this not be extended to cover planning enforcement matters generally?

15.250 *Mark Mackworth-Praed:* the deeper problem is that it's still not an offence to not comply with a TRN, and there is no power for the LPA to ensure that trees planted pursuant to a TRN survive – in a woodland, particularly, the landowner can simply let them die, and the LPA can do nothing – there's no further duty to replant again.

CONSULTATION QUESTION 15-14.

We provisionally propose that the scope of the matters prohibited by a tree preservation order should be extended to include the causing of harm to tree:

(1) **intentionally; or**

(2) **recklessly (for example, by the raising or lowering of soil levels around the base of a tree, or the grazing of animals in woodlands).**

Do consultees agree?

Number of responses

15.251 Total: 40 (37 in agreement, and 3 equivocal responses).

Responses strongly in agreement

15.252 *Mark Chester:* Yes, a really good idea!

Responses in agreement (without further comment)

15.253 Jon Brewin (Wrexham CC), Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Planning Inspectorate (PINS), National Trust, Newport City Council, Torfaen CBC, Monmouthshire CC, The Law Society, Neath Port Talbot CBC, RTPI, Bridgend CBC, Lawyers in Local Government, Keith Bush, PEBA, Cardiff Council, Huw Williams (Geldards)

Responses in agreement (with additional comment)

15.254 *Andy Lederer, Chartered Foresters:* I agree with the proposed extension to include other ways in which protected trees might be damaged. However, the following wording for (2) might be better: ‘Thoughtlessly, for example by severing major roots, substantially altering soil levels or grazing animals within woodlands’

15.255 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Ceredigion CC, Pembrokeshire CC, Rhondda Cynon Taf CBC:* Yes. Consideration should be given to amending the example used as the grazing of cattle under trees is a common practice and occurs in pastoral woodland; which is a land management practice that should not be made to look inappropriate. A more suitable example in this context would be mechanical issues such as failure to protect trees on development sites, which highlights a more significant risk.

15.256 *Julian Morris:* This proposal is a useful one, that I hope in the fullness of time finds its way into the legislation of the rest of the UK. 'Wilful' is a poor choice of word, and 'Intentional or reckless' I don't agree has just the same meaning but has a more useful one. There may even be an argument for 'careless' instead of 'reckless', to encourage the proactive consideration of consequences of operations at a tree. The careless spillage of damaging diesel on the roots of a tree, for example, could kill it or significantly reduce its amenity.

15.257 *Association of Local Government Ecologists:* We welcome this proposal. We have many examples of trees being lost due to inappropriate management of land around or adjacent to a tree, much of which appears to be intentional.

15.258 *Carmarthenshire CC:* Agree. It now proposes to include intentionally or recklessly e.g. grazing, changing soil levels.

15.259 *Mark Mackworth-Praed:* I support this proposal, which in my view would solve a lot of problems – I’ve had experience of many cases (from both sides of the fence) where actions have turned on arguments about whether the extent of damage caused to a

tree has been sufficient to "destroy" it or not – and both LPAs and Defendants working out the odds as to relative chances of success (and level of likely fine) in the Crown Court on the one hand, or in the Magistates' Court on the other. One obvious example of where cases get difficult is root damage to trees on development sites – one might be sure in one's own mind that the damage inflicted will (or won't) be sufficient to kill the tree, but how does one prove it (either way)? Sadly, some developers are all too aware of this problem, and I think it may in some cases may partially account for the cavalier attitude to tree protection exhibited on some development sites.

15.260 *Arboricultural Association:* Yes, the Arboricultural Association agrees that the term 'intentionally or recklessly' appears to be more appropriate than simply 'wilful', considering the apparent ambiguity of the term 'wilful' within statute law - the Wildlife & Countryside Act 1981 refers to these two terms. However, the AA feels it would be prudent to retain the term wilful too.

Equivocal responses

15.261 *Central Association of Agricultural Valuers:* We do not believe that grazing animals in woodland should be considered to cause reckless damage. Grazed woodlands (agro-pastoralism) are a feature of the landscape of parts of Wales with the alternative sometimes being unmanaged decay of the woodlands over time. There will be many cases where this does not cause damage and so we believe that on occasions that damage does occur it should be considered accidental not reckless.

15.262 *Woodland Trust, Ancient Tree Forum:* In principle the Woodland Trust and Ancient Tree Forum agree with the proposal. However, in the case of grazing in wood pastures and parkland or orchards we do not agree that it is detrimental, instead it is desirable to maintain the habitat. This should be made clear in guidance.

CONSULTATION QUESTION 15-15.

We provisionally propose that the two offences currently in section 210 of the TCPA 1990, relating to works liable to lead to the loss of the tree (subsection (1)) and other works (subsection (4)) should be replaced with a single offence, triable either summarily or on indictment, of contravening tree preservation regulations. Do consultees agree?

Number of responses

15.263 Total: 43 (40 in agreement, 1 equivocal response, and 2 others).

Responses in agreement (without further comment)

15.264 Pembrey and Burry Port Town Council, Jon Brewin (Wrexham CC), Andy Lederer, Chartered Foresters, Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Julian Morris, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Planning Inspectorate (PINS), Newport City

Council, Torfaen CBC, Monmouthshire CC, Bridgend CBC, Canal & River Trust, Lawyers in Local Government, Keith Bush, Cardiff Council

Responses in agreement (with additional comment)

15.265 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Neath Port Talbot CBC, Carmarthenshire CC, Ceredigion CC, Pembrokeshire CC, Rhondda Cynon Taf CBC:* Agreed. This would be more of a deterrent in issues where persons prune trees for views etc; or where there is an intangible benefit to a specific person. It will also make it easier for planning authorities to consider taking action as it is easier to identify that an offence has been committed rather than trying to discern what specific offence has occurred. This allows the courts to decide on the specific offence committed and issue the relevant fine.

15.266 *Mark Mackworth-Praed:* I support this proposal, which in my view would solve a lot of problems – I've had experience of many cases (from both sides of the fence) where actions have turned on arguments about whether the extent of damage caused to a tree has been sufficient to "destroy" it or not – and both LPAs and Defendants working out the odds as to relative chances of success (and level of likely fine) in the Crown Court on the one hand, or in the Magistates' Court on the other. One obvious example of where cases get difficult is root damage to trees on development sites – one might be sure in one's own mind that the damage inflicted will (or won't) be sufficient to kill the tree, but how does one prove it (either way)? Sadly, some developers are all too aware of this problem, and I think it may in some cases may partially account for the cavalier attitude to tree protection exhibited on some development sites.

15.267 *Arboricultural Association, London Tree Officers Association:* Yes, if potential loopholes in the legislation can be closed without the watering down of the offence(s) then the Arboricultural Association agrees that this is a positive step.

15.268 *The Law Society & Huw Williams (Geldards):* We agree that the position should revert to a single offence and agree a consistent approach to the design of cognate offences, such as unauthorised works to a listed building, is a desirable feature in the overall architecture of the Planning Code.

15.269 *RTPI:* This appears a sensible change, and would allow proportional fines.

15.270 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum strongly agree with the proposal to change the two offences to a single offence, triable either summarily or on indictment.

15.271 *PEBA*: Yes - combining the two offences into a single, triable either way offence is a sensible tightening up of the law.

Equivocal responses

15.272 *Mark Chester:* Not sure. A tree can suffer from poor pruning, yet remain a viable tree. There can be a difference in the severity of poorly pruning a tree and of felling it, especially if this is intentional.

Other comments

15.273 *Woodland Trust, Ancient Tree Forum:* We should also like to see that there is an unlimited time for LPAs to bring a prosecution and that the maximum penalty is an unlimited fine so that the court can determine the appropriate amount.

CONSULTATION QUESTION 15-16.

We provisionally consider that the offence under section 210 (of contravening tree preservation regulations) and the regulations made under section 202A prohibiting works to a tree subject to a tree preservation order should be framed so as to require the prosecution to prove that

(1) **a copy of the order had been served on the person carrying out the works before the start of those works; or**

(2) **a copy of the order was available for public inspection at the time of the works; and**

(3) **that a defence should be available to a person charged with such an offence if able to show that he or she had not been served with a copy of the order, did not know, and could not reasonably have been expected to know, of its existence.**

Do consultees agree?

Number of responses

15.274 Total: 46 (19 in agreement, 21 equivocal responses, and 6 in disagreement).

Responses in agreement (without further comment)

15.275 Keith Bush, RTPI, Bridgend CBC, Monmouthshire CC, Jon Brewin (Wrexham CC), Allan Archer, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Monmouth Town Council, Newport City Council, The Law Society, PEBA

Responses in agreement (with additional comment)

15.276 *Andy Lederer, Chartered Foresters:* I agree with the proposals (1) and (2) and also that it should be a valid defence that the defendant had not been served with the order and/or did not know of its existence.

15.277 *Planning Inspectorate (PINS):* Agreed. Does it also need to be made clear that the relevant order has been confirmed (which happens at a later date from when it is first made).

15.278 *Central Association of Agricultural Valuers:* We agree with this proposal, a person carrying out works cannot be expected to comply with a notice that they could not reasonably be expected to know about.

15.279 *Canal & River Trust:* We welcome this clarification, but we would also request that more detail is put into the new legislation on how a local authority makes orders available for inspection. As a minimum, we believe that Orders should be available on the council website in such a way as to be clearly identifiable (e.g. by use of a map-based system with copies of the actual order downloadable.)

15.280 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum agree with the proposal, subject in (2) to clarification of the meaning of 'available for public inspection at the time of the works'

15.281 *Cardiff Council:* Agree but 'Person carrying out the works' can this be clarified to include those who may have an interest in the land or who have appointed those to undertake the works.

15.282 Equivocal responses

15.283 *Institution of Civil Engineers Wales:* Yes but no.

15.284 *POSW, Ceredigion CC, Pembrokeshire CC, Pembrokeshire Coast NPA, National Parks Wales:* The phrase (serve notice) most-likely comes from the legal meaning (given a document), but it is common in colloquial usage, and is a very strong way of warning someone. In conclusion, the common use of word 'serve' is misunderstood – legal usage may be correct but will cause misunderstanding in this context. Clarify for non-legal users – use a more appropriate term.

15.285 *Rhondda Cynon Taf CBC:* The phrase (serve notice) most-likely comes from the legal meaning (given a document), but it is common in colloquial usage, and is a very strong way of warning someone. In conclusion, the common use of word 'serve' is misunderstood – legal usage may be correct but will cause misunderstanding in this context. Clarify for non-legal users – use a more appropriate term. There appears to provide a loophole in that if the tree contractor asks the landowner (who it is reasonable to assume is aware of any tree protection), who says there is not a TPO, then the contractor would be not be liable, only the landowner. It would be prudent to amend the statement to ensure that it is clear that the relevant person is responsible for proving that they have requested the said document: 'following a request to the local authority a copy of the order had been served on/ provided to the person carrying out the works before the start of those works;

15.286 *Pembrokeshire Coast NPA, National Parks Wales:* Partially agree - 'Serving' – The wording is the issue; it sounds like the responsibility becomes that of the planning authority; whereas the obligation should remain with the contractor/ landowner to contact the planning authority to acquire clarification prior to commencement. We do have a TPO plan on our website: http://www.pembrokeshirecoast.wales/Files/files/Mapping/TPO/index.html

15.287 *Caerphilly CBC, POSW South East Wales:* Yes, but does (3) 'and could not reasonably have been expected to know' introduce some doubt and area for debate. Surely, if the LPA can show that the documents are publicly available that should be enough?

15.288 *Julian Morris:* I disagree in part. The requirement for proof of service OR availability for inspection is acceptable, but there appears to be no reason to set up an alternative defence of 'did not know, and could not reasonably have been expected to know, of its existence'; if the requirement is to make available for inspection, then the industry should have but one means of checking and knowing of the existence of the Order, and that is to inspect. The 2012 English Regulation 8(c) is a good model for this, but needs to be applied to all existing Orders, whenever these were made. It is perhaps a minor point, but 'at the time of the works' would require a tree contractor to check the register, line up the work, and then check again on the day of the work. It could be more appropriate to require the Order to be available at least one week before the start of the works. A single rule for this is admittedly difficult, not for established and confirmed Orders but for new Orders, where the service on owners and occupiers and the affixing of Orders to affected trees would be a requirement to bridge the week delay.

15.289 *Association of Local Government Ecologists:* We largely agree with the proposal although it should be noted that a copy of the TPO order is currently required to be sent to the landowner at the time of the making of the TPO it surely cannot be the reasonable to expect a LA to notify each successor of ownership. This would require significant resources. Further clarification should be provided as what would then be considered to constitute 'available for public inspection'.

15.290 *Carmarthenshire CC:* The obligation should remain with the contractor/ landowner to contact the planning authority to acquire clarification prior to commencement. This is not clear from the new wording suggested.

15.291 *Lawyers in Local Government, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services:* Yes, but what will be the nature and quality of the evidence required by the prosecution to prove point (2)? There is a significant difference between proving an unsuccessful enquiry by a defendant (as in *Palmer*) and a positive duty on the prosecution to prove that a document was available for public inspection at a time [before] works were done.

15.292 *Mark Mackworth-Praed:* I think it would be preferable (and more practical) for the prosecution to have to prove it served the TPO on the owners and occupiers of the land, rather than on the person doing the work (who could be someone completely random that the LPA couldn't possibly have known had been instructed to do the work). As to "available for public inspection" – I think in this day and age it would be reasonable to extend this to include a copy of the TPO being on the LPA's website, or at least its coverage evident via an interactive mapping facility on the website. If these provisions were in place, I think it would then be correspondingly more difficult for a Defendant to show that he "could not reasonably have been expected to know" of a TPO's existence.

15.293 *Arboricultural Association:* (1) No comment. (2) The AA is uncertain as to why there is a need to shift the onus and is uncomfortable with the proposed wording "...public inspection at the time of the works", preferring to substitute 'at' with 'in advance'. It is also important to define the meaning of the term 'available for public inspection' if this change is to be made, as an offence may well be undertaken outside the opening times of local authority offices, or when the online services where the orders are held

are down for maintenance. It must also be clear that it is the responsibility of the person undertaking the works to check that TPOs or Conservation Area controls are not in place prior to undertaking the works, whether or not they are aware that the potential exists.

15.294 *London Tree Officers Association:* (1) The LTOA disagrees. (2) The LTOA is uncertain as to why there is a need to shift the onus and is particularly concerned about the works 'at the time of the works'. Ignorance should not be made a defence and those responsible should be expected to make enquiries.

15.295 *Torfaen CBC:* As with the response at 12-21, it may be equally as difficult for a LPA to prove that a TPO had been made available for inspection at the time of an offence if such a date is not formally recorded. In reality, as soon as a TPO is made, it is saved and kept (hard copy or electronic) but if an authority was asked to provide proof of the exact date when a TPO was made available for public inspection, then this may be difficult. The term "did not know, and could not reasonably have been expected to know" could be open to more challenge by a defendant. If there is a requirement for the LPA to prove that a copy of the order was available for public inspection (which we oppose), then the defence should relate just to that.

15.296 *Mark Chester:* Not sure how practical the first part is. The person undertaking the work may be employed by a third party. The second part is more feasible. I am aware of situations where a landowner employs another to undertaken work, with the reassurance that it is approved.

Responses disagreeing

15.297 *POSW, Ceredigion CC, Pembrokeshire CC, Neath Port Talbot CBC, Pembrokeshire Coast NPA, National Parks Wales:* Disagree. There appears to provide a loophole in that if the tree contractor asks the landowner (who it is reasonable to assume is aware of any tree protection), who says there is not a TPO, then the contractor would be not be liable, only the landowner. It would be prudent to amend the statement to ensure that it is clear that the relevant person is responsible for proving that they have requested the said document: 'following a request to the local authority a copy of the order had been served on/ provided to the person carrying out the works before the start of those works.

CONSULTATION QUESTION 15-17.

We provisionally consider that it would be more straightforward if an authority, on being notified under section 211 of the TCPA 1990 of proposed works to a tree in a conservation area, were to have four possible responses open to it:

(1) **to allow the works (either felling of the tree or other works to it) to proceed, with no conditions (other than as to the two-year time limit);**

(2) **to allow the tree to be felled, subject to a condition as to a replacement tree being planted;**

(3) **to impose a tree preservation order, and to allow works to the tree other than felling, possibly subject to conditions; or**

(4) **to impose a tree preservation order, and to refuse consent for the works.**

Do consultees agree?

Number of responses

15.298 Total: 43 (32 in agreement, 7 equivocal responses, 1 in disagreement, and 3 others).

Responses strongly in agreement

15.299 *Canal & River Trust:* We would welcome this clarification of process.

15.300 *The Law Society:* We agree the proposal is a welcome simplification of the current position.

Responses in agreement (without further comment)

15.301 Lawyers in Local Government, RTPI, Jon Brewin (Wrexham CC), Pembrey and Burry Port Town Council, Institution of Civil Engineers Wales, Allan Archer, Caerphilly CBC, POSW South East Wales, CLA, Merthyr Tudfil CBC, Blaenau Gwent CBC, Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services, Monmouth Town Council, Planning Inspectorate (PINS), Newport City Council, Torfaen CBC, Monmouthshire CC, Neath Port Talbot CBC, Bridgend CBC, Keith Bush, PEBA, Cardiff Council, Huw Williams (Geldards)

Responses in agreement (with additional comment)

15.302 *POSW, Pembrokeshire Coast NPA, National Parks Wales, Ceredigion CC, Pembrokeshire CC, Rhondda Cynon Taf CBC:* Yes agree. Inclusion of a replanting condition for trees as in (2) in Conservation Areas would be a prudent approach, as at present we are not able to do this.

15.303 *Carmarthenshire CC:* Yes agree. This streamlines the process which currently requires notification (6 weeks to decide if designate a TPO and then a further application to undertake the works.

Equivocal responses

15.304 *Andy Lederer, Chartered Foresters:* I agree with all of the proposed possible responses (1), (2) (3) and (4) as being basically good sense, provided there is reasonable flexibility under (2) regarding replacement planting. However, as someone with a great deal of experience of applying to carry out work to trees in this situation, I feel there is also a case for making the guidelines to planning authorities here stronger, more explicit.

(a) Planning Authorities need to be reminded strongly that in Conservation Areas if permission is granted for work to trees without a TPO being imposed then they cannot impose conditions on how the work is done. I know of at least one Council that has been in the habit of doing this i.e. assuming more power that it actually has.

(b) Planning authorities also need to be reminded strongly they may consult the public on proposed work to trees but it's not obligatory to do so on all applications. Whether or not to consult should be a matter of the authority's professional judgement and discretion.

Again, at least one Council I know has been in the habit of consulting the public on virtually all applications, in some cases clearly after the decision has already been made not to impose a TPO. Consulting the public more judiciously would save an enormous amount of wasted time, effort and expense.

15.305 *Mark Mackworth-Praed:* I believe the proposed reform is sensible as far as points (1), (3) and (4) are concerned, but I think point (2) is flawed – effectively what would be happening would be the tree owner being made to plant a replacement tree for a tree that didn't warrant protection in the first place – thus in effect being penalised for his honesty in notifying the LPA of his intentions. Somehow that doesn't seem quite cricket. As a general point, in my experience there are quite a number of LPAs that play a bit fast and loose with the S211 notice system as it is, "refusing" notifications, or imposing "conditions" on their "permissions". On balance, I think they should all be pulled up and made to play with a straight bat and by the rules, before giving them any more latitude.

15.306 *Arboricultural Association:* (1) Yes – as per the status quo;

(2) Yes – this appears to be a positive step, as the removal of trees over time from a Conservation Area can have a cumulatively detrimental effect on its character, even if the subject tree does not qualify for a TPO in itself.

The AA feels that there would need to be a mechanism whereby the tree planted as a condition of the CA notice was protected without needing to require the replacement tree to have a stem diameter of 7.5cm or more. The same issue arises for trees removed in contravention of section 211 of the TCPA OR when removed as an exception (see PPG at .gov.uk)

(3) Yes – this appears to be a sensible and removes the unnecessary bureaucracy associated with the need to make a new application under the TPO.

(4) Yes – Clarification that on the making of the TPO the work is also 'refused consent' would be helpful.

15.307 *London Tree Officers Association:* (1) Yes

(2) Yes. Providing the size exemption for conservation areas does not counteract the condition. The LTOA feels that there would need to be a mechanism whereby the tree planted as a condition of the CA notice was protected without needing to require the replacement tree to have a stem diameter of 7.5cm or more. The same issue arises for trees removed in contravention of section 211 of the TCPA OR when removed as an exception (see PPG at .gov.uk)

(3) No. A TPO should be made to enable a decision to be made, part consenting to any acceptable works. Local Authorities have the ability to negotiate the amendment of a conservation area notice with the applicant to agreed lesser works.

(4) No. A TPO should be made.

15.308 *Mark Chester:* With the exception of point 2, this is the existing arrangement.

15.309 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum agree with the objectives of the proposals. There are, however, consequential possible burdens for both owners and the LPA. The simplicity of the notification system means that for the majority of trees that would not merit a TPO there is a minimum of administration for both sides. We have previously advocated Tree Conservation Areas for their light touch and simple approach.

As above in Q 15-5 it would be very beneficial if the LPA developed a Conservation Plan and where appropriate worked with owners to introduce legally binding statutory management agreements similar to Heritage Partnership Agreements as used for historic parks and gardens. This would make it more transparent to the community how owners are contributing to the whole quality of the landscape and may allow them to benefit from financial support in return for signing up to an agreement.

Responses disagreeing

15.310 *Julian Morris:* This is problematic, as it makes it up to the Council to have to say what extent of works would be acceptable instead of the proposed works. Compare the application information requirements for example at present in England for

- a Conservation Area notice, "the act in question (with sufficient particulars to identify the tree)"
- a 5 day notice "notice in writing of the proposed activities" and
- TPOs " an application for consent to the cutting down, topping, lopping or uprooting of any tree in respect of which an order is for the time being in force shall—

  a) be made in writing to the authority on a form published by the Secretary of State for the

  b) purpose of proceedings under these Regulations;

  c) include the particulars specified in the form; and

  d) be accompanied, whether electronically or otherwise, by—

  i. a plan which identifies the tree or trees to which the application relates;

  ii. such information as is necessary to specify the work for which consent is sought;

  iii. a statement of the applicant’s reasons for making the application; and

iv. appropriate evidence describing any structural damage to property or in relation to tree health or safety, as applicable.

Compensation liabilities for damage (and nuisance, see earlier) for the LPA would also arise on refusal.

The idea of automatic refusal of an implied TPO application in a s.211 notice is currently unworkable because it would mean a notice would have to contain as much info as a TPO app (spec, reasons for etc.) which will be a heavy burden on most notifications, just to avoid the need for a full TPO applications on a few cases.

Other comments

15.311 *Mark Chester:* Conservation Areas are an anomaly, with the built environment being the main feature for protection. Would it not be better to treat CAs as Area TPOs, and require LPAs to survey them for trees of merit, say over the next 5 years?

15.312 *Glamorgan Gwent Archaeological Trust:* Trees in Conservation Areas: Whilst [this question] relates to works to a tree in a Conservation Area, and imposition of a TPO, with the applicant seeking dual consent, noting that this could become one application and remaining subject to conditions, the associated question named (15.16) relates to offences and prosecutions. Responding to the paragraph rather than the question we note that conservation areas can have high archaeological sensitivity, and where works to fell trees and remove stumps may have an adverse archaeological impact we are consulted and make recommendations for conditions. We would be content to agree to the proposal if the provision for merging still includes conditions so the archaeological resource is protected.

15.313 *London Tree Officers Association:* The LTOA consider that an application form for a CA notification would be appropriate, to avoid any doubt that a tree report submitted as a supporting document to a planning application can be treated as a CA notification. The LTOA are aware of instances where such a report will contain wording along the lines that 'for the avoidance of doubt the tree work proposed in this report should be treated as the applicant's formal notice of intent to carry out the tree work under the terms of section 211 of the TCPA (1990); clearly this is unlikely to be picked up until a late stage in a six week process, if at all.

CHAPTER 15: GENERAL COMMENTS

15.314 *Simon Pryce, Simon Pryce Arboriculture:* Most of the proposals I've seen look eminently sensible and things many of us have had on the wish list for a long time. One thing that doesn't seem to have been mentioned, but is a significant problem in places, is where residential development occurs on the site of woodland TPOs which are not revoked or amended. A sapling exemption would go some way to addressing that, although there will be protected woodlands where regeneration should be safeguarded.

I think this could be made more consistent with the Forestry Act procedures by an automatic application of the felling licence exemptions for gardens, orchards, public

open spaces etc, to sites covered by woodland TPOs. That way genuine woodland remains protected, the planning process gives the LPA the option to apply individual or group TPOs to domestic gardens pre construction if they see fit and the residents don't need consent to remove unwanted seedlings and badly chosen ornamental specimens from the garden centre.

15.315 *John Almond:* When a tree is protected by a tree preservation order it should be protected and should be regarded as sacrosanct, whether in a rural or urban environment, and should not be damaged in any way unless a proven danger to human life. It is important to note that a dead or hollow tree does not necessarily pose a danger, in fact hollow trees have been proven to be safer in many instances than solid trunk trees. People living or working in properties adjacent to trees with a TPO often ask for it to be removed or 'trimmed' because it causes nuisance in one form or another. Presumably, the tree was there before the development and the present occupiers would have known that the tree would grow. Therefore any cutting or trimming should not be allowed.

Sometimes permission is asked to reduce the crown of the tree or prune it to restrict the spread and this, again, should be refused, especially as it is self defeating. Any horticulturalist or arboriculturist knows that pruning encourages growth so, if the tree is trimmed, it will only encourage faster future growth. The tip or uppermost growth of plants/trees produce growth inhibiting chemicals which they pass down the plant to the lower shoots and buds. If the apical growths are cut off this process stops, allowing the next layer of shoots to grow rapidly as each tries to gain dominance over its neighbours. Within two to three years the tree will be higher than it would have been if left alone. This is the principle behind the age-old practice of pollarding and coppicing, viz; cut the tree back to produce more vigorous growth. Additionally, trimming or crown reduction spoils the natural appearance of the tree and is comparable to knocking down a wing of a historic, listed building because it is considered inconvenient.

Where a tree exists and is protected by a TPO, no development, and this includes storage of materials, should be permitted within a prescribed radius of the tree, may I use the term curtilage, to prevent damage to the tree or its roots, bearing in mind that the roots extend further than the branches of the tree.

15.316 *Bay of Colwyn Town Council:* Bay of Colwyn Town Council's Tree Warden concurred with [John Almond's] response during the Committee debate, adding:

I have read through the part about the trees. And agree with them a tree with a TPO on it should be protected at all costs. Too many developers just cut them down because they know they only get a £2000.00 fine for doing so (which to them is like 50p to me and you) and they just pass it on to the price of the property they are building. In England it's a £ 20,000 fine and they have to replace the tree in the exact spot. I feel the same should be the case in Wales.

15.317 *Andrew Ferguson:* It is my understanding that you can't take enforcement action against non-compliance with conditions on works to protected trees as they are not conditions attached to a planning permission which is the terms referred to in legislation. This discrepancy should be resolved in the new Bill. It should be possible to take enforcement action against all conditions (trees, advertisements, LBs etc etc).

15.318 *London Tree Officers Association:* 1.The LTOA considers that the legislation could be improved by providing greater clarity in defining the exemption from the need to make a separate tree works application 'so far as such work is necessary to implement a planning permission'. This currently gives rise to uncertainty, for example where a tree is shown to be removed on a plan approved as part of a planning permission, but where in reality the tree does not need to be removed to implement that permission. In addition there can be a degree of ambiguity where an applicant will argue that it is necessary to remove a tree for construction space or access, but where a different means of construction may allow the retention of the tree.

2. The LTOA consider there is merit in an argument that trees which are replaced pursuant to a condition on a tree consent should be automatically protected by the original TPO.

15.319 *Woodland Trust, Ancient Tree Forum:* The Woodland Trust and Ancient Tree Forum welcome many of the proposed recommendations in the consultation document. These changes will ensure that woodland and trees of amenity value will be better protected by the law and many of the proposals will close the gaps through which many have been lost.

However, the Woodland Trust and Ancient Tree Forum consider that the proposals do not provide an appropriate level of protection for priority habitats such as wood pastures and parkland or traditional orchards or for trees of national special interest. Their protection needs to be addressed through additional changes which we outline at the end of this document under other issues.

Legislation, policy, guidance and incentives all need to work together to provide the right framework in order that owners appreciate the need for control of their valuable assets and are adequately rewarded for protection and management of natural tree and woodland capital on behalf of society.

Therefore, in addition to the proposed changes to Planning Law, there will be a need to address other regulatory tools, such as felling licences and planning policy, to provide an integrated system which will ensure that loss or damage to important woods and trees outside TPO protection is avoided.

The causes of loss or deterioration of important woods and trees are perhaps greatest through inappropriate agricultural land management or forestry intensification activities which are either out with current regulation or inspection and enforcement resources are stretched to their thinnest. Therefore, incentives such as subsidies and grants need to dovetail with controls to ensure that owners are encouraged to manage their trees and woods according to good practice.

<u>Other points</u>

1. Statutory management agreements

We consider that it would be beneficial if the community could be reassured about the care and maintenance of trees and wooded habitats in appropriate situations, through the use of management agreements. We would welcome this opportunity of

revision of the law to introduce legally binding statutory management agreements along the lines of Heritage Partnership Agreements as used for historic parks and gardens.

In particular we consider that it should be a requirement that in the interests of parity and transparency, LPAs should be required to prepare Heritage Partnership Agreements with their own communities for trees in their ownership or responsibility (eg parks, school grounds and street trees)that would fit the criteria for protection if they were on private land and with other agencies that are protected by Crown Immunity.

2. List of Trees of National Special Interest

Although the TPO provides a means to give legal protection to trees there is no accompanying system to differentiate those which might have greater value especially in a national context. The Welsh Government set up a Task and Finish Group to explore better protection for ancient, veteran and other heritage trees and as part of the discussions agreed the need for a Register or List of these most important trees. The WT and ATF have proposed that such a list might be titled 'Trees of Special National Importance (TNSI)'.

TNSIs are those uniquely valuable and irreplaceable individual trees or collections of trees which by age, size, character, rarity, or associations with historic events or people, are agreed to be of national special interest biologically, culturally or in the landscape. We propose that such trees are designated as Tree/s of National Special Interest (TNSI). They are an important, distinctive and much cherished part of the Welsh landscape and natural heritage.

The Woodland Trust and Ancient Tree Forum consider the current changes to the Planning Law to be an opportunity to establish a statutory List or Register of TNSIs. Although this would not give any legal protection for trees included, it would highlight their importance to local authorities when considering whether to make TPOs. However, as proposed in our response to 'Taking forward Wales' sustainable management of natural resources' consultation, we would like to see a duty placed on LPAs to use their powers to protect threatened nationally important trees included in such a list.

Chapter 16: Improvement, regeneration and renewal

CONSULTATION QUESTION 16-1.

We provisionally propose that the Bill should be drafted so as to make clear that a notice under what is now section 215 of the TCPA 1990, requiring land to be properly maintained, can be issued where the condition of the land:

(1) **is adversely affecting the amenity of part of the authority's area or the area of an adjoining authority; and**

(2) **does not result in the ordinary course of events from, the lawful carrying on of continuing operations on that land or a continuing use of that land that is lawful.**

Do consultees agree?

Number of responses

16.13 Total: 31 (26 in agreement, 3 equivocal and 2 in disagreement).

Responses in agreement (without further comment)

16.14 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; Sirius Planning; Neath Port Talbot CC; Lawyers in Local Government; Pontarddulais Town Council, Keith Bush; Allan Archer, PEBA, Rhondda Cynon Taf CBC, Cardiff Council

Responses in agreement (with additional comment)

16.15 *RTPI:* It is important that for lawful uses of land such as industrial sites, the use or operations should be allowed to continue. It is important that the 2 tests should both be satisfied before a s215 Notice is served.

16.16 *Carmarthenshire CC:* Makes clear that it is for amenity reasons and that it would not apply where the results are derived from a lawful operation.

16.17 *Theatres Trust:* We foresee this being of relevance to theatre buildings where theatre use has discontinued. Additional powers to enforce the appropriate upkeep and maintenance of these and other buildings to better enable their re-use particularly for their intended purpose is welcomed.

16.18 *The Law Society:* We agree that the proposals as far as they go are welcome, but think that further consideration is needed in relation to the ordinary course of events". The sort of situation that we have in mind is where a development such as housing sites becomes derelict and unsightly beyond the transient unsightliness that

accompanies a development that proceeds steadily to completion. Such a site may still be in a lawful position in that there is live permission that can be continued, so that the site could not be said to be abandoned" in terms of planning law. It may perhaps be argued that this is a matter of fact and degree, but the prospects of such arguments are likely to deter authorities from resorting to section 215. They might be encouraged to do so and to give heed to complaints if it was made clear that properly maintained" included land and building and the course of development.

Equivocal responses

16.19 *Barry Town Council:* Whenever there is a works order for change, better defined description should be made.

16.20 *Pembrey and Burry Port Town Council:* The Committee stated it would be necessary to ensure that reference be made to land (including buildings)" be made throughout to ensure it does not fall foul of the appeals process.

16.21 *Central Association of Agricultural Valuers:* We stress the importance of point two within this question. Ordinary and lawful use should not result in a notice requiring improvement.

Responses disagreeing

16.22 *Bridgend CBC:* This would mean that LPAs have to concern themselves with the history of any site before they can issue a s215. Currently s217 provides grounds to appeal a notice and the existence of a ground of appeal is a matter for the person appealing the notice. The proposed change will put the onus on the LPA and will be met with an argument that we have not taken sufficient steps unless the planning history of every site is examined. S215 is about the condition of land rather than its lawful use and this change is likely to result in a situation where s215s are very difficult to use.

16.23 *Jordan Whittaker:* Section 215 of the Town and Country Planning Act 1990 allows local planning authorities to serve a notice on the owner or occupier of any land that is in such a condition as to be adversely affecting the amenity of the area. Notices served under Section 215 will require the owner or occupier to remedy the condition of the land, and if the person on whom a notice is served fails to comply with the requirements of the notice, the authority may take the required action itself and recover costs from the owner or occupier. Section 216 of the Act makes it an offence to fail to comply with the requirements of a notice issued under Section 215. The powers provided by Section 215 are used, among powers granted by other legislation, by local authorities responding to the illegal dumping of waste on private land ('fly-tipping'). A redacted example of such a notice issued under Section 215 is appended to this document.

Other legislation enabling local authorities to deal with the illegal dumping of waste on private land, such as Sections 2 and 6 of the Refuse Disposal (Amenity) Act 1978, places responsibility for removing the waste on the person who deposited it, and allows local authorities to recover costs from the offender if the local authority has to clear the waste itself. The 1978 Act does not allow the owner or occupier of the affected land to be held responsible for rectifying the effects of the offence, unless

the owner or occupier committed the offence. Sections 148 and 149 of the Highways Act 1980 take a similar approach in relation to refuse illegally deposited on highways.

Section 59 of the Environmental Protection Act 1990 allows the owner or occupier of land on which waste has been illegally deposited to be served with a notice requiring the waste to be removed, however the Act provides for a notice to be appealed on the ground that the person on whom it was served did not cause or knowingly permit the waste to be deposited. Section 217 of the Town and Country Planning Act 1990 similarly provides for appeals against notices served under Section 215, but the grounds specified in Subsection 217(1) do not provide for an appeal on the basis that the loss of amenity with which a notice is concerned was caused by a person other than the appellant.

Due to this oversight, local authorities may pursue prosecutions against victims of fly-tipping for failing to comply with a Section 215 notice requiring them to dispose of another person's waste. The particular way in which Sections 215 to 219 were drafted allows enforcement action to be taken without reference to the safeguards and exemptions afforded by the provisions of other Acts, which, unlike Section 215, were specifically drafted with the problem of fly-tipping in mind.

Unfortunately this is not merely a theoretical problem, as some local authorities have been known to use Section 215 powers in this way. These misuses are often reported to the Country Land and Business Association (CLA), whose members – many of them farmers – are often victims of fly-tipping.

The use of Section 215 powers in connection with fly-tipping is not confined to rural areas. I have been motivated to submit this response following similar experiences in connection with offences committed on a commercial property in an urban setting. Residential property may also be affected.

The clearance costs imposed on victims of fly-tipping can easily run into thousands of pounds for a single small-scale incident involving controlled waste, such as asbestos. This is unfortunately common, and where the victim is a small business, household, or family farm, the expense of complying with the requirements of a Section 215 notice may be ruinous.

To bring the provisions of the Town and Country Planning Act 1990 into line with the other relevant law in this area, and to provide fairness to victims of fly-tipping, I suggest that textual amendments to the existing law should be introduced to the new Code replacing Section 215, along the following lines:

1. After Subsection 215(4) insert—

'(4A) A notice must not be served under subsection (1) above if—

(a) the condition of the land to which the notice relates is attributable to an act, or acts, carried out by a person other than the owner or occupier of the land, and

(b) neither the owner nor occupier of the land caused or knowingly permitted the land to come into such a condition.'

2. In Subsection 217(1), after paragraph (d) insert—

'(e) that the condition of the land to which the notice relates is attributable to an act, or acts, carried out by a person other than the person on whom the notice was served, and the person on whom the notice was served neither caused nor knowingly permitted the land to come into such a condition.'

3. In paragraph (b) of Subsection 219(1), for 'the person who is then the owner of the land' substitute 'the person who caused or knowingly permitted the land to come to be in the condition in which it was when the notice was served,'

Other comments

16.24 *Jordan Whittaker:* An example of a Notice to remove waste, issued in 2018 by a local authority pursuant to Section 215 of the Town and Country Planning Act 1990. This notice was issued to the owner of the land on which the waste had been deposited. The land had been affected by a fly-tipping offence committed by a person other than the owner or occupier. The waste was brought to the attention of the local authority when the offence was reported to the local authority by the occupier, shortly before the notice was issued. The officer who issued the notice was aware of the circumstances.

Environmental Protection Act 1990, The Prevention Of Damage By Pests Act 1949, Section 215 Of The Town And Country Planning Act 1990, Refuse Disposal Amenity Act 1978, Clean Neighbourhoods And Environment Act 2005, Control Of Pollution Act 1989, Public Health Act 1936.

To [redacted]

Address [redacted]

Notice to remove waste from

Drive of ~~Garden / yard / alleyway~~

At Address [redacted]

Brief description of accumulation: Household waste, Furniture and cardboard

Nottingham City Council hereby gives you seven days notice in which to remove the above items and dispose of them in a legal manner.
A copy of this notice has been provided to Public Health who will pursue appropriate statutory action should you fail to comply.

Date 18/01/2018 Signed [redacted]

Job title CPO Collar number [redacted]

Householders duty of care
Householders must take all reasonable measures to make sure household waste produced on their property is only passed on to an authorised person for correct disposal.

What happens if I pass my household waste on to an unauthorised person?
If the unauthorised person fly tips your waste and the rubbish is traced back to your household, you could be fined up to £5000 for the offence.

How can I make sure the person taking my rubbish is authorised?
Use only registered waste carriers who are licensed with the Environment Agency. Check they are registered on line by contacting the Environment Agency.

How do I find a registered waste carrier?
The Environment Agency website gives details of all registered waste carriers
http://www2.environment-agency.gov.uk/epr/search.asp?type=register

Please note
Nottingham City Council operate a bulky refuse collection service which is free for certain types of waste. You may be able to make arrangements by telephoning 0115 915 2000. Appointment dates are given if this service is offered to you and your rubbish must not be left on the footpath, road or area of land to which the public have access.

Date of follow up inspection 25/01/2018

NOTTINGHAMSHIRE POLICE Nottingham City Council

CONSULTATION QUESTION 16-2.

We provisionally propose that it should be possible to issue a notice (under what is now section 215 of the TCPA 1990) where the condition of the land in question results from the carrying on of operations or a use of the land that were once lawful, but are no longer lawful. Do consultees agree?

Number of responses

16.25 Total: 26 (24 in agreement, 1 equivocal response, and 1 in disagreement).

Responses in agreement (without further comment)

16.26 Allan Archer; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Cynwyl Elfed Community Council; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrey and Burry Port Town Council; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CC; RTPI; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA, Cardiff Council, Rhondda Cynon Taf CBC

16.27 **Responses in agreement (with** additional **comment)**

16.28 *Carmarthenshire CC:* Provides clarity that s215 can be applied in situations where operations over time are no longer lawful.

Equivocal responses

16.29 *The Law Society & Huw Williams (Geldards)*: [in response to 16-1 and 16-2] We agree that the proposals as far as they go are welcome, but think that further consideration is needed in relation to "the ordinary course of events". The sort of situation that we have in mind is where a development such as housing sites becomes derelict and unsightly beyond the transient unsightliness that accompanies a development that proceeds steadily to completion. Such a site may still be in a lawful position in that there is live permission that can be continued, so that the site could not be said to be "abandoned" in terms of planning law. It may perhaps be argued that this is a matter of fact and degree, but the prospects of such arguments are likely to deter authorities from resorting to section 215. They might be encouraged to do so and to give heed to complaints if it was made clear that "properly maintained" included land and building and the course of development.

Responses disagreeing

16.30 *Institution of Civil Engineers Wales*: It is not clear at what point something that was once lawful ceases to be so. This suggestion is likely to lead to more problems than it would perhaps solve.

CONSULTATION QUESTION 16-3.

We provisionally propose that a notice under the provision in the new Code replacing section 215 TCPA 1990 (time of notice taking effect):

(1) **should come into force on a particular date specified in it (rather than at the end of a specified period from the date of service);**

(2) **should be issued" (rather than served" as at present), with a copy served on all relevant parties[1]; and**

(3) **should contain a notice as to the rights of any recipient to appeal against it.**

Do consultees agree?

Number of responses

16.31 Total: 28 (27 in agreement, and 1 in agreement subject to conditions).

Responses in agreement (without further comment)

16.32 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Theatres Trust; Pembrey and Burry Port Town Council; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

16.33 *Allan Archer:* These would seem sensible amendments as serving such a notice is often difficult when trying to establish all ownership of vacant or abandoned properties/land. This proposal should expedite the process and make clear the rights of all recipients to appeal.

16.34 *The Law Society & Huw Williams (Geldards):* We agree and welcome the theme of consistency across the whole range of enforcement and cognate notices.

16.35 *RTPI:* This would seem sensible as serving such a notice is often difficult when trying to establish all ownership of vacant or abandoned properties/land. This response will expedite the process. The consultation makes it explicit about the rights of all recipients to appeal.

16.36 *Carmarthenshire CC:* Partly agreed. Inclusion of a date as to when the notice will take effect provides clarity. [Point 2 refers to 'advertisements' – this appears to be an error and should refer to the matters for which the s215 is being served.]

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[1] In the Consultation Paper, this question erroneously referred to all those displaying the advertisement in question.

Responses in agreement (subject to conditions)

16.37 *Jordan Whittaker:* I strongly agree with the Commission's provisional proposal to require a notice to communicate the right to appeal. Although it is unclear which specific statute was intended to authorise the Notice appended to this document, Section 215 of the Town and Country Planning Act 1990 is listed among the statutes on the header. The Notice makes no reference to the right to appeal. In line with the response to Consultation Question 16-1 above, I suggest that the Commission consider recommending that a notice should not be served on any person who did not cause or knowingly permit the loss of amenity to which the notice relates.

CONSULTATION QUESTION 16-4.

We provisionally propose that the Bill should make it clear that all appeals against section 217 notices (appeals) are normally to be determined by inspectors, in line with consultation question 11-3. Do consultees agree?

Number of responses

16.38 Total: 25 (25 in agreement).

Responses in agreement (without further comment)

16.39 Institute of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Theatres Trust; Pembrokeshire CC; PINS; Torfaen CBC; Lawyers in Local Government; Keith Bush; PEBA; Cardiff Council; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

16.40 *Allan Archer:* The determination of all s215 appeals by Inspectors should be normal practice"

16.41 *Carmarthenshire CC:* General acceptance that appeals are to be dealt with by Inspectors – provides an independent viewpoint.

16.42 *RTPI:* This would seem sensible. We are aware of the closure of Magistrates Courts across Wales, seeking court time is an issue in many areas and recourse to inspectors would appear to be an appropriate response. Appointed inspectors are appropriately trained to assess impact on the amenity of land.

16.43 *The Law Society:* The general scheme of the Code should be that all appeals should go in the first instance to a planning inspector for determination (or, exceptionally, the Ministers).

16.44 *Neath Port Talbot CC:* Agreed, although it is understood that appeals against s215 notices have already been transferred to the Planning Inspectorate.

16.45 *Bridgend CBC:* Yes. The Town and Country Planning (Referred Applications and Appeals Procedure) (Wales) Regulations 2017 came into force on 5th May 2017 and transferred S.217 (untidy land) Appeals from the Magistrates Court to PINS.

16.46 *Newport CC:* Yes but guidance required (no existing forms and procedures).

CONSULTATION QUESTION 16-5.

We provisionally propose that the new Planning Code could include powers, replacing those currently available under section 89(2) of the National Parks and Access to the Countryside Act 1949, to enable a planning authority, in relation to any land whose condition is affecting the amenity of its area or of any adjacent area (or is likely to affect it due to the collapse of the surface as the result of underground mining operations):

(1) **to issue a notice, and serve a copy of it on the owner and occupier of the land, stating the authority's intention to carry out remedial works;**

(2) **to carry out itself the works specified in the notice, either**

- **on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or**

- **where no response is received to the notice; and**

(3) **to recover the cost of such works from the owner, or to make them a charge on the land; and**

(4) **to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement.**

Do consultees agree?

Number of responses

16.47 Total: 27 (23 in agreement, 1 equivocal response, and 3 in disagreement).

Responses in agreement (without further comment)

16.48 Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Theatres Trust; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; Keith Bush, PEBA, Rhondda Cynon Taf CBC; Cardiff Council

Responses in agreement (with additional comment)

16.49 *Allan Archer:* The two s215 and s89(2) powers are closely related and I agree that they should both be included, side by side if possible, in the Planning Code.

16.50 *Carmarthenshire CC:* Agreed. The amendment would help clarify that the LPA can take action with regard to any land whose condition is affecting the amenity of its area or an adjoining area

16.51 *Pembrey and Burry Port Town Council:* The Committee were agreed that abolishing these schemes would be beneficial. It queried whether or not there would be any effect on the City Regions" such as Swansea Bay City Region.

16.52 *RTPI:* This would harmonise the powers available under S89 and S215 and would seem sensible. Prior to any remedial works being undertaken the planning authority would have to issue a Notice. This is established procedure and this harmonisation of the two procedures is welcomed.

Equivocal responses

16.53 *Jordan Whittaker:* In line with the response to Consultation Questions 16-1 and 16-3 above, I suggest that the Commission consider recommending that notices should not be served under the new Planning Code on any person who did not cause or knowingly permit the loss of amenity to which a notice relates, and that provision is made for notices to be appealed on similar grounds.

Responses disagreeing

16.54 *Institution of Civil Engineers Wales:* No. This is adequately covered by Qs.16-3 & 16-6 and is therefore unnecessary.

16.55 *The Law Society; Huw Williams (Geldards):* We think that the discussion of section 89(2) is misconceived. The derivation of the provision was from the Derelict Land Act 1982, which conferred powers to deal with derelict land on the Secretary of State (in England), the Welsh Development Agency (in Wales) and local authorities (in Wales and England). In Wales, historically, derelict land remediation funding was channelled through the Welsh Development Agency, which also possessed its own land acquisition, including CPO, powers. Any reconsideration of section 89(2) should be in the context of Phase 4 of the codification exercise dealing with regeneration and development.

16.56 *Central Association of Agricultural Valuers:* We highlight the importance of paragraph 16.32 of the consultation paper. It is imperative that lawful use must not result in the landowner being charged money to rectify issues that are diminishing the amenity of an area. Very often the money required to complete such works will simply not be available to the landowner while the underground mining may have been outside the control of the owner or his predecessors in title. Paragraph 16.32 states: Where the condition of the land arises as the result of lawful use or operations, a notice under section 215 (as currently enacted) cannot be served. However, remedial works could be carried out by the authority itself under section 89, but only with the consent of the owner, which is only likely to be forthcoming on condition that the authority meets the cost of the work, which is likely to limit its applicability in practice. We do not believe compulsory purchase powers should be available for this purpose.

CONSULTATION QUESTION 16-6.

We provisionally propose that the new Planning Bill should include powers, equivalent to those currently available under section 89(1) of the National Parks and Access to the Countryside Act 1949, to enable a planning authority:

(1) **to issue a notice, and serve a copy of it on the owner and occupier of the land, stating the authority's intention to carry out landscaping works for the purpose of improving the land;**

(2) **to carry out itself the works specified in the notice, either**

- **on terms agreed between it and the owner and occupier of the land (both as to the carrying out of the works themselves and as to the subsequent maintenance of the land); or**

- **where no response is received to the notice; and**

(3) **to acquire the land for the purpose of carrying out such works, using compulsory powers or by agreement.**

Do consultees agree?

Number of responses

16.57 Total: 26 (21 in agreement, and 5 in disagreement).

Responses in agreement (without further comment)

16.58 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire CC; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CC; Bridgend County Borough Council; Lawyers in Local Government; Keith Bush, Cardiff Council; PEBA; Rhondda Cynon Taf CBC.

Response in strong agreement

16.59 *RTPI:* This proposal for powers to issue a Notice, undertake remedial works and the ability to acquire land using CPO or by agreement is welcomed. Such powers can be used positively to promote economic regeneration and serve the aims of wider sustainable development.

Responses in agreement (with additional comment)

16.60 *Allan Archer:* This is a potentially beneficial provision, supplementary to the previous items, which I agree should be included in the Planning Code.

16.61 *Carmarthenshire CC:* Agreed. Clarity regarding the LPA being able to undertake the works itself, however this does not go far enough – there is no mention of the LPA recouping its costs in this instance (recharge)?"

Responses disagreeing

16.62 *CLA:* No. The narrative does not appear to accord with the content of question 16-6. The content of question 16-6 suggests that the authority carry out these works even if the owner of the land opposes them. To improve the land" is subjective and vague, particularly if it involves new tree planting on former agricultural land without compensating the difference in agricultural / woodland values. If acquired by agreement" any negotiation will be under the threat of CPO. Therefore the CLA prefers that it should be by agreement only.

16.63 *Central Association of Agricultural Valuers:* We do not agree that compulsory purchase powers should be available for this purpose. It should be possible to work collaboratively with a landowner. Where it is not possible to work collaboratively and the use of land is illegal enforcement action may be taken. We believe these alternative routes should be sufficient.

16.64 *Sirius Planning:* We do not agree with the proposed provision to include rights to acquire the land. With the provision of parts (1) and (2) the acquisition of the land is unnecessary.

16.65 *The Law Society; Huw Williams (Geldards):* This power is also related to regeneration and development and positive planning" powers and further consideration should be deferred to Phase 4.

CONSULTATION QUESTION 16-7.

We provisionally propose that the Bill should contain powers for the Welsh Ministers to make regulations to facilitate the removal of graffiti and fly-posting, by enabling planning authorities:

(a) to deal with graffiti or fly-posting that is detrimental to amenity or offensive, by requiring the users or occupiers of the land affected to remove it;

(b) to deal with persistent unauthorised advertising, by serving a notice on those responsible for surfaces persistently covered with fly-posting, requiring them to take preventive measures to minimise recurrence; and

(c) in either case, to take direct action where necessary, and recharge those responsible where appropriate.

Do consultees agree?

Number of responses

16.66 Total: 29 (22 in agreement, 4 equivocal responses and 3 in disagreement).

Responses in agreement (without further comment)

16.67 Caerphilly CBC; POSW South East Wales; CLA; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC;

Pembrokeshire CC; PINS; Newport City Council; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Rhondda Cynon Taf CBC; Allan Archer

Responses in agreement (with additional comment)

16.68 *Merthyr Tudfil CBC:* Agreed. However it's doubtful that LA's will have the resources to use the power!

16.69 *Carmarthenshire CC:* Agreed. It would appear that providing LPAs with powers to deal with graffiti and persistent fly posting will aid with addressing such issues within an area.

16.70 *The Law Society & Huw Williams (Geldards):* We agree that powers to address graffiti and fly-posting should be introduced and that a self-contained code made contained in regulations offer a more flexible way of addressing a persistent but also constantly evolving problem.

16.71 *RTPI:* New powers to serve a notice, undertake works and recover the costs of removal are welcomed.

Equivocal responses

16.72 *Institution of Civil Engineers Wales:* (1) No; (2); No; (3) Yes: 1 & 2 would be seen to be too heavy handed.

16.73 *North and Mid Wales Association of Local Councils:* Any enforcement of such practices should also be the subject of fixed penalty notices by Town and Community Councils who have taken over the Street Scene from Principal Authorities.

16.74 *Cardiff Council*: Would this be a duplication of powers that maybe available under Environmental Legislation, and present a potential resource implication for the LPA.

16.75 *Blaenau Gwent CBC:* We suggest that this matter be the subject of further consideration, specifically whether such powers should exist outside the planning system.

Responses disagreeing

16.76 *Central Association of Agricultural Valuers:* We strongly believe that it is inequitable to penalise one person for another's actions, we therefore think that a landowner should not be required to pay to rectify damage caused by another. Such a requirement could be both inconvenient and unaffordable for the landowner.

16.77 *Sirius Planning:* We oppose the provision to serve notice on those occupying/owning land that has been subject to flyposting and graffiti, as well as the ability to recharge any action taken. Graffiti and flyposting are illegal and should not be accounted for within planning regulations. Further, trespassers make their way onto even the most secure sites and therefore it is unreasonable to penalise landowners if all reasonable methods are being deployed to prevent it.

16.78 *Jordan Whittaker:* The current regime for dealing with graffiti and fly-posting under the Town and Country Planning Act 1990 enables local authorities to require the owner or occupier of defaced premises to remedy the defacement, rather than the person who caused the defacement. Subsection 225F(8) of the Act does, however, prevent local authorities from recovering the costs of remedying a defacement from the owner or occupier if the affected surface is part of a dwelling.

16.79 In the spirit of Subsection 225F(8), I suggest that the Commission consider recommending an extension of that exemption to small business premises. In many cases small business premises will include a dwelling, and imposing a requirement on the owner or occupier to remedy a serious defacement caused by another person could lead to severe hardship for the person on whom a notice is served.

16.80 Comprehensively addressing the issue of liability for remedying the defacement of premises may be a matter for Parliament or the Welsh Assembly, given that it generally appears to have been the intention of the Act to make owners and occupiers liable. If the Commission were, however, to make provisional recommendations for reform providing liability relief to the owners and occupiers of premises affected by graffiti and fly-posting, I would suggest amendments to the provisions of the Town and Country Planning Act 1990 along the following lines:

1. After Subsection 225F(3) insert—

'(3A) A notice must not be served under subsection (2) or (3) above on any person who neither caused nor knowingly permitted the sign to appear.'

2. In Subsection 225I(2), after paragraph (c) insert—

'(d) that the person on whom the notice was served neither caused nor knowingly permitted the sign to appear;

(e) that the notice should have been served on another person.'

3. Omit Subsection 225I(5).

4. In paragraph (b) of Subsection 225J(2), for 'from the person who asked the local planning authority to do it' substitute 'any person who caused or knowingly permitted the sign to appear'.

CONSULTATION QUESTION 16-8.

We provisionally propose the amendment of:

(1) **Part 18 of and Schedules 32 to the Local Government, Planning and Land Act 1980 (enterprise zones), and**

(2) **the provisions relating to enterprise zones in the TCPA 1990 and related legislation,**

so that they apply in future only in relation to England. Do consultees agree?

Number of responses

16.81 Total: 24 (22 in agreement, 1 in agreement subject to conditions and 1 in disagreement).

Responses in agreement (without further comment)

16.82 Institution of Civil Engineers Wales; Penstrowed Community Council; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire County Council; PINS; Newport CC; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Cardiff Council; PEBA; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

16.83 *RTPI:* On the basis of the reasoning in the report, this would seem to be sensible. Also see our response to question 5.12.

16.84 *The Law Society:* We agree that these are all powers that can be removed, future proposals for special purpose authorities are unlikely to be so closely aligned to the structures of these bodies that any of them could be revived without significant amendment. It is also desirable that future legislation starts with a clean slate" and meanwhile the Code will be shorter and simpler if the existing models are not retained.

Responses in agreement (subject to conditions)

16.85 *Ceredigion CC:* Agreed in principle, but in order to comply with WG legislative powers shouldn't this read 'no longer apply in Wales'.

Responses disagreeing (with additional comment)

16.86 *Carmarthenshire CC:* Disagree. Although Enterprise Zones have not much been used in the past – keeping them in keeps all options open to LAs going forward. Suggest that detailed wording is however considered to ensure fit for purpose.

CONSULTATION QUESTION 16-9.

We provisionally propose the amendment of:

(1) **the New Towns Act 1981, and**

(2) **the provisions relating to new towns in the New Towns and Urban Corporations Act 1985, the TCPA 1990, the Housing and Regeneration Act 2008, and related legislation,**

so that they apply in future only in relation to England. Do consultees agree?

Number of responses

16.87 Total: 25 (24 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

16.88 PINS, RTPI, Institution of Civil Engineers Wales; Penstrowed Community Council; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council: Pembrokeshire CC; Newport City Council; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; Keith Bush, National Trust; Cardiff Council; PEBA; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

16.89 *The Law Society:* We agree that these are all powers that can be removed, future proposals for special purpose authorities are unlikely to be so closely aligned to the structures of these bodies that any of them could be revived without significant amendment. It is also desirable that future legislation starts with a clean slate" and meanwhile the Code will be shorter and simpler if the existing models are not retained.

16.90 *Ceredigion CC:* Agreed in principle, but in order to comply with WG legislative powers shouldn't this read 'no longer apply in Wales'.

Responses disagreeing (with additional comment)

16.91 *Carmarthenshire CC:* Disagree. Although New Towns have not much been used in the past – keeping them in keeps all options open to LAs going forward. Suggest that detailed wording is however considered to ensure fit for purpose.

CONSULTATION QUESTION 16-10.

We provisionally propose the amendment of:

(1) **Part 16 of and Schedules 26 to 31 to the Local Government, Planning and Land Act 1980 (urban development areas and urban development corporations); and**

(2) **the provisions relating to urban development corporations in the New Towns and Urban Development Corporations Act 1985, the TCPA 1990, the Leasehold Reform, Housing and Urban Development Act 1993, and related legislation,**

so that they apply in future only in relation to England. Do consultees agree?

Number of responses

16.92 Total: 25 (22 in agreement, 2 in disagreement, and 1 other.).

Responses in agreement (without further comment)

16.93 Planning Inspectorate (PINS), RTPI, Penstrowed CC; Caerphilly CBC; POSW South East Wales; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire County Council; Newport CC; National Trust; Torfaen CBC; Neath Port Talbot CC; Lawyers in Local Government; Keith Bush; Cardiff Council; PEBA; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

16.94 *The Law Society:* We agree that these are all powers that can be removed, future proposals for special purpose authorities are unlikely to be so closely aligned to the structures of these bodies that any of them could be revived without significant amendment. It is also desirable that future legislation starts with a clean slate" and meanwhile the Code will be shorter and simpler if the existing models are not retained.

16.95 *Ceredigion CC:* Agreed in principle, but in order to comply with WG legislative powers shouldn't this read 'no longer apply in Wales'.

Responses disagreeing

16.96 *Institution of Civil Engineers Wales:* No. Urban Development Corporations (UDC) should remain available for use in Wales. When large scale development is proposed, to be undertaken by a variety of developers, a UDC facilitates the stage management of the development and can avoid the situation of developers refusing to cooperate with each other to a useful end result. The Cardiff Bay development provided an excellent demonstration of this situation in the way that all of the development was overseen, but current development in Cardiff under its LDP could so easily degenerate into the situation described. Urban Development Corporations also allow for the acquisition of land at current value, so that subsequent planning gain is passed into the public purse for use rather than to the landowner. This is important for Wales.

16.97 *Carmarthenshire CC:* Although such designations have not much been used in the past – keeping them in keeps all options open to LAs going forward. Suggest that detailed wording is however considered to ensure fit for purpose.

Other comments

16.98 *The Law Society:* We would dispute the reference at paragraph 16.83 to the Cardiff Bay Development Corporation's principal role as being to oversee the construction of the Cardiff Bay Barrage. It undertook many other projects and had many other successes during its existence as described in the regeneration statement published by CBDC when it was wound up.

CONSULTATION QUESTION 16-11.

We provisionally propose the amendment of:

(1) **Part 3 of the Housing Act 1988 (housing action trust areas), and**

(2) **the provisions relating to housing action trusts in the TCPA 1990 and related legislation,**

so that they apply in future only in relation to England. Do consultees agree?

Number of responses

16.99 Total: 24 (23 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

16.100 PINS; Institution of Civil Engineers Wales; Penstrowed Community Council; Caerphilly CBC; POSW South East Wales; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire CC; Newport CC; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Cardiff Council; PEBA; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

16.101 *National Trust:* Support the proposed changes. Housing is now a devolved power and The Housing (Wales) Act 2014 aims to improve the quality and standards of housing in Wales. No Housing Action Trusts have been designated in Wales and regeneration policy funded via the Viable and Viable Places programme.

16.102 *RTPI:* We agree. Housing is now a devolved power and The Housing (Wales) Act 2014 aims to improve the quality and standards of housing in Wales. No Housing Action Trust Areas have been designated in Wales and regeneration policy funded via the Viable and Viable Places programme and the recently launched targeted regeneration investment policy are the appropriate mechanisms for tackling areas with serious housing and other social problems. Stock transfer of local authority housing and the release of subsidy to bring homes up to the Welsh Housing Quality Standard have been largely successful across Wales.

16.103 *The Law Society:* We agree that these are all powers that can be removed, future proposals for special purpose authorities are unlikely to be so closely aligned to the structures of these bodies that any of them could be revived without significant amendment. It is also desirable that future legislation starts with a clean slate" and meanwhile the Code will be shorter and simpler if the existing models are not retained.

16.104 *Ceredigion CC:* Agreed in principle, but in order to comply with WG legislative powers shouldn't this read 'no longer apply in Wales'.

Responses disagreeing (with additional comment)

16.105 *Carmarthenshire CC:* Although such designations have not been used in Wales in the past – keeping them in keeps all options open to LAs going forward. Suggest that detailed wording is however considered to ensure fit for purpose.

CONSULTATION QUESTION 16-12.

We provisionally propose the amendment of Part 3 of and Schedule 5 to the Agriculture Act 1967 (rural development boards) and related legislation so that they apply in future only in relation to England and Scotland. Do consultees agree?

Number of responses

16.106 Total: 23 (22 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

16.107 PINS; Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Country Land and Business Association; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire CC; Newport CC; Torfaen CBC; Neath Port Talbot CC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Allan Archer; Cardiff Council; PEBA; Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

16.108 *The Law Society:* We agree that these are all powers that can be removed, future proposals for special purpose authorities are unlikely to be so closely aligned to the structures of these bodies that any of them could be revived without significant amendment. It is also desirable that future legislation starts with a clean slate" and meanwhile the Code will be shorter and simpler if the existing models are not retained.

16.109 *Ceredigion CC:* Agreed in principle, but in order to comply with WG legislative powers shouldn't this read 'no longer apply in Wales'.

Responses disagreeing

16.110 *Carmarthenshire CC:* Although such designations have not been used in Wales in the past – keeping them in keeps all options open to LAs going forward. Suggest that detailed wording is however considered to ensure fit for purpose.

Chapter 17: High Court challenges

CONSULTATION QUESTION 17-1.

We provisionally propose that the provisions currently in Part 12 of the TCPA 1990 (challenges in the High Court to the validity of actions and decisions under the Act) should be replaced in the Planning Code by new provisions to the effect that a court may entertain proceedings for questioning any decision of a public body under the Code (other than one against which there is a right of appeal to the Welsh Ministers) – and any failure to make any such decision – but only if:

(1) **the proceedings are brought by a claim for judicial review; and**

(2) **the claim form is filed:**

- **before the end of the period of four weeks in the case of a challenge to the decision of the Welsh Ministers on an appeal against an enforcement notice (other than a decision granting planning permission), a tree replacement notice, an unsightly land notice or a decision refusing a certificate of lawfulness of existing use or development; or**

- **before the end of the period of six weeks in any other case,**

beginning with the day after the day on which the relevant decision was made.

Do consultees agree?

Number of responses

17.1 Total: 31 (30 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

17.2 Caerphilly CBC; POSW South East Wales; CLA; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrey and Burry Port Town Council; Pembrokeshire CC; Home Builders Federation; Newport City Council; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Natural Resources Wales; Cardiff Council; PEBA

Responses in agreement (with additional comment)

17.3 *Allan Archer:* Well understood, sensible and should help make the law easier to understand and to reduce the risk of confusion of errors.

17.4 *Accessible Retail:* We support this recommendation as we believe it would provide a single, less complex route to resolving issues.

17.5 *Carmarthenshire CC:* Agreed. Makes sense that avenues of challenge are the same whether they are challenging the LPA decision (JR) or a WG decision. Having 2 systems is confusing to the public.

17.6 *Planning Aid Wales:* PAW agrees and considers that uniform rules and procedure for challenge aid understanding, and that the existing complexity of the law needs reform.

Planning Inspectorate (PINS): Yes, this seems appropriate and reasonable.

17.7 *National Grid:* The planning system depends upon public confidence in its operation. Effective scrutiny is an important element in providing that confidence, particularly when one considers the significant challenges for Ministers such has those discussed in R v Secretary of State (ex-party Holding and Barnes). Clarification and simplification of the one of the routes by which the public can ensure effective scrutiny of planning decisions is welcomed and supported.

17.8 *The Law Society:* We completely agree with the analysis in the Consultation Paper. Although a significant change it is not felt that this would be a controversial move. The origins of procedure by way of statutory challenge predate the modern development of judicial reviews and especially the leave to proceed stage. Judicial review procedure is widely understood and the exceptions where there is a right to "a day in court" regardless of the prospects of success looks increasingly anomalous. The proposal allows for a much more straightforward approach for potential claimants and advisors alike. The timetabling proposals also allow greater clarity and certainty for all parties and the differentiation between a four and six weeks limitation recognises the need for urgency in certain cases.

17.9 *RTPI:* The proposals appears to bring together all challenges under the judicial review procedures, which are well understood and should help to make the law easier to understand and reduce the risk of confusion and errors.

17.10 *Canal & River Trust:* The proposal put forward appears to be well substantiated and we agree with this proposal.

17.11 *UK Environmental Law Association:* The process of statutory review has limited value and creates confusion around the processes of challenge and routes to access to justice. Therefore, we agree with the proposal to address in this in the Code.

17.12 *Keith Bush:* The period for appeal should be the same in each case, which should be 6 weeks to provide allow reasonable time to consider appealing.

17.13 *Bar Council:* The Bar Council agrees that the proposed provisions would simplify and make matters clearer in respect of challenges to such actions and decisions by relevant authorities. It is noted however that these provisions would not appear to apply to challenges to a 'relevant document' ie local development plan which is currently addressed by s.113 of the PCPA 2004. If it is the intention that such challenges should be also covered by this single provision then that would of course need to be added. In addition, we note that the CPR would need to be amended to reflect these changes.

17.14 *Huw Williams (Geldards)*: I completely agree with the analysis in the Consultation Paper. The origins of procedure by way of statutory challenge pre-date the modern development of judicial reviews and especially the leave to proceed stage. Judicial review procedure is widely understood and the exceptions where there is a right to "a day in court" regardless of the prospects of success looks increasingly anomalous.

17.15 *Rhondda Cynon Taf CBC*: Agreed – this is an example of where the new code can simplify procedures and make it clear how decisions are to be challenged. The law of judicial review is capable of addressing all legal challenges to planning decisions.

Responses disagreeing

17.16 *Friends of the Earth Cymru:* Planning challenges in Wales should revert to the 12-week timeframe. The UK Government is currently being challenged around JR costs both within domestic courts and has been considered by the Aarhus Compliance Committee and a communication has been issued. We therefore are of the view that Wales should not simply adopt Westminster's stance, but should consider the Aarhus Convention Art 8 as far as possible in relation to planning that is within its competence.

CONSULTATION QUESTION 17-2.

We provisionally consider that the provisions of Part 5 of the PCPA 2004 (relating to the correction of minor errors in decisions) should be included within the Bill, but amended so as to allow a 14-day period within which the Welsh Ministers or an inspector can respond to a request to make a correction to their decision, and an applicant can respond to a notification by them that they propose to make such a correction. Do consultees agree?

Number of responses

17.17 Total: 24 (24 in agreement).

Responses in agreement (without further comment)

17.18 Caerphilly CBC; POSW South East Wales; CLA; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire CC; Newport City Council; Planning Inspectorate (PINS); Torfaen CBC; Neath Port Talbot CC; Bar Council; Bridgend CBC; Lawyers in Local Government; Keith Bush

Responses in agreement (with additional comment)

17.19 *Allan Archer:* I think the proposal to include a limited period for minor errors to be corrected is sensible and hopefully could avoid having to go through lengthy challenge procedures when a correction would resolve an issue. I see no reason to disagree

17.20 *Carmarthenshire CC:* Agreed. This options of making minor corrections to a decision is already available to WG or an Inspector – the change simply bring that into the new Code.

17.21 *The Law Society & Huw Williams (Geldards):* Agree. The 14-day grace period for corrections is a sensible proposal to avoid unnecessary applications to the High Court, particularly for minor mistakes such as “clerical errors”.

17.22 *RTPI:* The proposal to include a limited period for minor errors to be corrected is sensible and could avoid lengthy challenge procedures when a correction would resolve an issue.

17.23 *Merthyr Tudfil CBC:* Agreed. The power for LPA’s to correct mistakes should also be introduced.

17.24 *Rhondda Cynon Taf CBC*: Agreed. It would be useful if planning authorities had a similar ability.

17.25 *Cardiff Council*: Yes. Could the LPA also benefit from a similar power.

Chapter 18: Miscellaneous and supplementary provisions

CONSULTATION QUESTION 18-1.

We provisionally propose that the Bill should:

(1) **rationalise as far as possible the bodies or categories of bodies that are to be treated as statutory undertakers for the purpose of some or all of the Code (and for which provisions); and**

(2) **provide for each undertaker or category of undertaker what is to be regarded as "operational land" and who is "the appropriate Minister".**

Do consultees agree?

Number of responses

18.13 Total: 33 (24 in agreement, 3 requests for greater detail, 5 equivocal responses and 1 other).

Responses in agreement (without further comment)

18.14 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Pembrokeshire CC; Planning Inspectorate (PINS);a Newport City Council; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Natural Resources Wales; PEBA; Huw Williams (Geldards); Cardiff Council

Responses in agreement (with additional comment)

18.15 *SP Energy Networks:* Lastly, attention is drawn to Chapter 18 which deals with statutory undertakers, such as SP Energy Networks (SP Manweb) in managing the assets of the licenced electricity network operator in north Wales, as referred to in para. 18.10. On the suggestions mentioned, SP Energy Networks agrees to the question in Q18.1, in particular, clarity on the appropriate minister is very welcomed. With regard to the point raised in para. 18.32/Q18.2, SP Energy Networks would again like to express its willingness to engage in a subsequent review of the GPDO. SP Energy Networks would not want to see any permitted development powers removed without separate consultation.

18.16 *The Law Society:* We agree that the code should use a single and consistent definition of a statutory undertaker. There should be Order-making power to amend the description of statutory undertakers in the Code to enable a flexible response to changes and reorganisations of the services provided through statutory undertakings. We agree that a there should be a single definition or table for reference for the Code that states who is "the appropriate Minister" for the time being. Again, this should be

subject to amendment by Order. We suggest a further power to define "operational land" by Order. This would enable individual undertakers to be fully consulted.

18.17 *Rhondda Cynon Taf CBC*: Agree as this would make the provisions clear. The law relating to statutory undertakers can be confusing and whilst it may not be something that is dealt with on a regular basis a lot of time can be spent gaining an understanding of the provisions and how they apply.

Responses requesting greater detail

18.18 *National Grid:* Statutory undertakers - Rationalising definitions of 'statutory undertaker', Permitted Development within the GPDO, clarity about the definition of 'operational land', and identification of the appropriate Minister makes sense in principle. The detail of how any clarification is achieved may have unintended consequences for many statutory undertakers, including National Grid. Consultation on draft revisions will be important to ensure that that clarity is the outcome that is achieved.

18.19 *RTPI:* Further detail is required in relation to this proposal in order to provide an informed position.

18.20 *Allan Archer:* Personally, I'd like to see some more detail before giving this proposal unqualified agreement

Equivocal responses

18.21 *Pembrokeshire Coast NPA; National Parks Wales; Carmarthenshire CC:* Tends to be confusion as to whether National Parks can be included as a statutory undertaker – especially with regard to coastal agency and highway agency status. We did have the discussion on the Dyfed Act so perhaps this too is an area which could be simplified and made clearer.

18.22 *Canal & River Trust:* The Trust benefits from a number of permitted development rights by virtue of its status as a statutory undertaker under the TCPA (as a body authorised by statute to carry on inland navigations) which are vital for the operation of our network in England and Wales. Whilst we are not against "rationalising" the list of bodies for the purposes of the Code, it is essential that the Trust and other statutory navigation authorities remain covered in any list or definition.

Equally, whilst we are not against further clarity as to the definition of "operational land" (which should include any land directly or indirectly used for the purpose of carrying out a statutory undertaking), it is essential that this does not cut down extent of the definition of "operational land" in the TCPA. In fact, the Trust considers the definition of "operational land" in the TCPA unduly restrictive with respect to its exclusion of land acquired by statutory undertakers post 1968 and sees no real justification for the exclusion of such land from this definition, given that the statutory duties imposed on bodies like the Trust can apply equally here as to any other operational land.

Finally, the Trust would welcome further provision is to be regarded as the "appropriate Minister" for each undertaker. In the Trust's case, the minister

responsible for our field of activity is likely to be the Secretary of State for the Environment, Food & Rural Affairs

18.23 *Arqiva:* (1) Electronic Communications Code Operators are already a distinct category that derive from the UK law on electronic communications which is not a devolved matter. It would therefore be inappropriate for any rationalisation to end or blur this category.

(2) We support the concept of defining "operational land" and in due course that having due application in possible PDR revisions – we are mindful, for example, that PDRs for many statutory undertakers are very wide on operational land, reflecting their statutory undertakings and the circumstances of that land. By contrast, in Wales, for example, we still have to obtain planning permission for comparatively minor additions of apparatus on our operational sites that may be required to implement national transformation programmes.

Defining "the Appropriate Minister" may also be helpful when it may not be clear whether that Minister is a Welsh Minister and if so which one, or perhaps the UK Secretary of State for Digital, Culture, Media and Sport. For example, the Code Operator powers of Compulsory Purchase are set out in Schedule 4 to the Communications Act 2003, as amended (UK Law). This applies the CPO provisions (not devolved) in the Town and Country Planning Act (as applicable in Wales, under devolved powers), but can only be used on the authority of the Secretary of State, raising the question of which one. We believe that it would be the UK S of S for DCMS, but you will appreciate the scope for confusion and clarification would be helpful.

Other comments

18.24 *Arup:* Linked to the types of consent under the planning system, in our capacity acting on behalf of statutory undertakers we provide detailed advice on the provisions of the GPDO and consenting requirements associated with the statutory undertaking. Generally, we would establish if the works fall outside the definition of development and therefore do not require planning consent; if works are development and would benefit from general consent; and finally if works are development and do not benefit from general consent, what the planning consent strategy should be.

Typically, the nature of the works would require us to make a distinction between leveraging general consent or applying for planning consent. However, the level of detail required moving from general consent straight to planning consent is sometimes significant and it would help matters if there were additional intermediate options better scaled to the nature of development so that the consenting route was proportionate. For example, certain types of development can come forward utilising prior notification or prior approval processes and it is this form of consenting that could be more widely used as described.

For example, when acting on behalf of sewerage undertakers in accordance with Part 16 Class A (a) of the GPDO, where development is not on operational land it is required to be below ground in order to benefit from permitted development rights. Subsequently, sewerage undertakers are able to carry out extensive below ground works relating to their undertaking.

However, a significant proportion of all below ground works also require the installation of associated above ground electrical equipment in the form of control kiosks. As it currently stands, these above ground structures require planning consent. Subsequently, sewerage undertakers cannot exercise their permitted development rights to full effect as both below ground and above ground infrastructure function in tandem.

It is acknowledged that it would be unreasonable to give sewerage undertakers unrestricted freedom to erect such above ground structures under permitted development rights. However, it is considered that a more proportionate approach could be taken that involves seeking prior approval from the local planning authority on the siting and design of these structures (as long as they remain within defined scale parameters).

This would strike a balance between controlling the potential impacts on the environment whilst acknowledging that these structures are intrinsic the statutory undertaking and should be more straightforward to deliver in tandem with underground infrastructure works.

CONSULTATION QUESTION 18-2.

We provisionally propose that, when the GPDO is next updated, consideration should be given to separating those provisions relating to development by statutory undertakers, the Crown, mineral operators, and other similar bodies, from those relating to development generally. **Do consultees agree?**

Number of responses

18.25 Total: 33 (15 in agreement, 2 equivocal responses, and 16 in disagreement).

Responses in agreement (without further comment)

18.26 Institution of Civil Engineers Wales; Merthyr Tudfil CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth Town Council; Torfaen CBC; RTPI; Allan Archer; Planning Inspectorate (PINS); The Law Society; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Equivocal response

18.27 *Mineral Products Association:* We reserve judgement on the proposals to separate the provisions in the GPDO applying to those listed (including mineral operators) from those relating to development in general. There are those which apply to development generally which may apply equally to mineral operators and other similar bodies.

18.28 *Blaenau Gwent CBC:* No strong opinion either way.

Responses disagreeing

18.29 *Newport City Council:* No, one document.

18.30 *POSW; Monmouthshire CC; Pembrokeshire Coast NPA; National Parks Wales; Carmarthenshire CC; Ceredigion CC; Pembrokeshire CC; Neath Port Talbot CBC:* We don't see any rationale for separating those provisions relating to mineral operators from those relating to development generally. In general terms one document is surely better than two GPDO's?

18.31 *Caerphilly; POSW South East Wales:* The existing system appears to work well and could be left alone without any disbenefit.

18.32 *Arqiva:* We do not see any particular need for this, as someone only interested in householder development can simply look at that part. However, while we do not object to the suggestion as such, we make the point that at present, anyone can utilise the general PDRs as well any that specifically relate to the development in question and/or to the status of that person, who might also benefit from specific PDRs. If this suggestion is adopted that latitude should not be ended.

18.33 *Canal & River Trust:* We don't see any need for this proposal. A single document containing all permitted development rights is, in our view, the simplest way to address this issue. Statutory Undertakers also benefit from permitted development rights relating to development generally and therefore it is useful for these to be in one document. Whatever form the GPDO takes we would not want to see any erosion of rights under the section relating to inland waterways.

18.34 *National Grid:* The suggestion that future iterations of the GPDO should separate the general development from development by the Crown, statutory undertakers, mineral operators etc. is an interesting question. It may well help with presentation, but the document is largely a technical tool for professionals with significant experience of using multiple Parts of the Order. The current structure does not seem to present this user group with any significant challenges.

18.35 *CLA:* No. Many statutory undertakers are privatised utilities operated for profit. They should not be granted different development rights to the detriment of the private landowner (water companies have already achieved this to their financial advantage).

18.36 *Neath Port Talbot CBC*: Disagree. The rationale for separating those provisions relating to mineral operators from those relating to development generally. In general terms one document is surely better than two GPDO's?

CONSULTATION QUESTION 18-3.

We provisionally propose that sections 283 and 316A of the TCPA 1990 (relating to the display of advertisements on the operational land of statutory undertakers and local authorities that are statutory undertakers) should not be restated in the Code. Do consultees agree?

Number of responses

18.37 Total: 24 (24 in agreement).

Responses in agreement (without further comment)

18.38 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrey and Burry Port TC; Pembrokeshire CC; Planning Inspectorate (PINS); Newport City Council; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Canal & River Trust; Lawyers in Local Government; Keith Bush, RTPI, Allan Archer; Cardiff Council; PEBA; Huw Williams (Geldards)

Responses in agreement (with additional comment)

18.39 *Rhondda Cynon Taf CBC*: The explanation given for this proposal is that s.283 provides that the provisions which apply to the grant of planning permission on operational land does not apply to the display of advertisements but such displays require consent under the Advertisement Regulations so this section is no longer required. I see no objection to the proposal.

CONSULTATION QUESTION 18-4.

We provisionally propose that section 316A of the TCPA 1990 (which enables regulations to be made relating to planning permission for development by local authorities that are statutory undertakers) should not be restated in the Bill. Do consultees agree?

Number of responses

18.40 Total: 22 (21 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

18.41 Planning Inspectorate (PINS); Caerphilly CBC; POSW South East Wales; CLA; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrey and Burry Port Town Council; Pembrokeshire CC; Newport City Council; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Cardiff Council; PEBA;

Responses in agreement (with additional comment)

18.42 *The Law Society & Huw Williams (Geldards):* We are not aware of any local authority statutory undertakings in Wales. We agree the provision need not be restated.

18.43 *RTPI:* We are not aware of any proposal to designate a local authority as a statutory undertaker and would not therefore object to this proposal.

18.44 *Allan Archer:* While I am not aware of any proposal to designate a local authority as a statutory undertaker and would not therefore object to this proposal I think it would depend on whether anyone else is aware of a need for this provision. If none of the responses can identify any need for this section and it is not carried forward, this would not prevent it being brought back at some time in the future if the need arose

18.45 *Rhondda Cynon Taf CBC*: Agree as no regulations have ever been made under 316A which provides "In relation to statutory undertakers who are local planning authorities, section 283 and the provisions specified shall have effect subject to such exceptions and modifications as may be prescribed."

Responses disagreeing (with additional comment)

18.46 *Institution of Civil Engineers Wales:* No. There has been discussion in South Wales for some time on the subject of providing a metro for transportation purposes. This metro may include a street tramway or light railway system within Cardiff, which may be operated by or on behalf of either the local authority or the Welsh ministers. These regulations may become necessary in this eventuality and they should be retained therefore.

CONSULTATION QUESTION 18-5.

We provisionally propose that the new Bill should generally use – in place of the term "winning and working of minerals" – the term "mining operations" defined so as to include:

(1) **the winning and working of minerals in, on or under land, whether by surface or underground working;**

(2) **the removal of material of any description from:**

- **a mineral-working deposit;**
- **a deposit of pulverised fuel ash or other furnace ash or clinker; or**
- **a deposit of iron, steel or metallic slag; and**

(3) **the extraction of minerals from a disused railway embankment.**

Do consultees agree?

Number of responses

18.47 Total: 30 (27 in agreement, 2 equivocal responses, and 1 other).

Responses strongly in agreement

18.48 *Pembrokeshire Coast NPA; National Parks Wales; POSW; Monmouthshire CC; Ceredigion CC:* [Yes/Agreed]. Clarifying this definition is welcomed.

Responses in agreement (without further comment)

18.49 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; Planning Inspectorate (PINS); Newport City Council; Torfaen CBC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; PEBA

Responses in agreement (with additional comment)

18.50 *Allan Archer:* I agree with the analysis of the LC and their preference to use the term 'mining operations' as it appears in the fundamental definition of development. I agree with this proposal.

18.51 *The Law Society & Huw Williams (Geldards):* We agree. "Mining" is now a generally accept term for these operations.

18.52 *RTPI:* We support the analysis and proposal set out in the consultation document. We also question whether clause (2) should also provide for the operation of removing material from former domestic and industrial waste tipping sites, if such activity is not covered elsewhere?

18.53 *Carmarthenshire CC*: Yes. Clarifying this definition of 'winning and working' minerals is welcomed.

18.54 *Cardiff Council*: Yes agree in principle but would this broader definition mean that the requirements for periodic review mineral permissions would also apply to mineral working deposits and disused railway embankments?

18.55 *Rhondda Cynon Taf CBC*: Agree the use of one term clarifies matter and the proposed definition does appear to be clear and easy to understand.

Equivocal responses

18.56 *Mineral Products Association:* We note the proposed changes to simplify terminology associated with minerals development such as winning and working, mining operations, etc. Some of this terminology has supposedly been clarified in case law and it is unclear how the reforms will address this or what the status of that case law will be post any reform. We do however support changes which clarify and simplify the terminology, subject to detailed consultation with the minerals industry. If "mining operations" is to be the preferred term, it is important that this capture the full scope of a minerals development from start to finish, inclusive of beneficiation and other activities which may take place on a site.

Paragraph 18.57 makes reference to the term mineral planning authority and, as mentioned above, pending changes to local government through shared services, must be captured by any amendments to this.

Paragraph 18.58 recognises that mineral working is different from other forms of development. This statement alone should flag the concerns the minerals industry has over the delivery of a steady and adequate supply of minerals within the current

land-use planning system. A more fundamental review of the system should consider whether or not the land-use planning system is the correct place to determine consents for mineral development.

Unfortunately, the seven points identified in paragraph 18.58 typically represent a negative aspect by the ill-informed, failing to recognise their importance to society, which ultimately creates the demand for the mineral products. Houses, schools, hospital, roads and other infrastructure are wholly reliant on mineral products. Further, the minerals sector routinely presents and delivers opportunities for largescale biodiversity and net gain.

18.57 *CLA:* In respect of question 18-5(3), stone deposit on a disused railway embankment/line is not a "mineral" nor is the man-made embankment. Moving the bank should be an "engineering operation" not a mining operation.

Other comments

18.58 *Mineral Products Association:* The foundation for planning legislation was largely developed at a time when the structure of local government was markedly different. This was particularly the case for the provision of minerals when County Councils, as mineral planning authorities, had the knowledge, expertise and strategic overview to deal with matters which were of local, regional, national and cross boundary importance.

The abolition of the two-tier system to a unitary approach has resulted in more parochial decision making and loss of experience and understanding of the need for minerals in society. Pending changes to local government, with shared services providing a more strategic overview for certain local government services, are under consideration, although details of any reform have yet to be finalised. Whilst the Regional Aggregate Working Parties continue to function, the level of mineral planning knowledge within the Local Planning Authorities has undoubtedly been undermined over recent years.

The explosion in both primary and secondary planning legislation over the past two decades has focussed principally on housing delivery and minerals planning is now very much an after-thought, shoe-horned in to this system. This is evident from the small section dealing with minerals in the Law Commission's review. Half a dozen pages in a 500+ page document. The consequential effects of minor changes to deliver built development in the spatial context continue to have a marked and often ill-considered impact on the minerals planning process and upon developments themselves. Minerals developments are already constrained by location, by the fact that minerals can only be worked where they are found. There is increasing evidence that the land use planning system is not fit for purpose in ensuring the demand for minerals is met as landbank replenishment rates continue to fall.

Demand for sand and gravel continues to outstrip the amount of new reserves being permitted, with the 10-year average replenishment rate for land won sand and gravel remaining low at 60%. During 2016, newly consented sand and gravel reserves only represented 20% of annual sales. In the case of crushed rock, whilst the 10-year average replenishment rate remains above 100% (largely as a result of one site granted consent in Scotland within the past 10 years), the new reserves permitted in

2016 were less than the annual sales for the fourth consecutive year. This signals that the long-term reserve base upon which the aggregates sector is, so dependant continues to remain under pressure. The number of planning applications for new mineral submitted by the industry remains low. Lack of plan coverage, creating investment uncertainty, the continuing impact of the recession and the cumulative costs of obtaining permissions and permits are likely to be contributory factors.

Further evidence of the long-term stress that is being placed on these important mineral reserves can be found in the latest British Geological Survey Aggregate Monitoring survey for England and Wales (AM14) which shows that total land won aggregate reserves have reduced by 44% over the period 2001 to 2014.

On a 10 year average the time taken to determine a mineral planning application (excluding pre-application discussion) is 17 months for sand and gravel and 16.2 months for crushed rock. Including pre-application discussions, the time extends to 31 and 30 months respectively, although the overall time taken in application preparation through to implementing a consent can be significantly longer. Typically, it takes between 5 to 15 years to convert sites from exploration into active operational sites.

We, feel therefore, that the current review may have been somewhat hamstrung by the scope of the project and that a more fundamental review of the process to deliver mineral planning consents and deliver new reserves, is necessary to consider why the current system is failing. We note that a Scoping Paper was produced in 2016 and it is indicated that a wide range of stakeholders were notified. It is disappointing that the Mineral Products Association which is principal trade association for one of the key stakeholders involved in the land use planning process, the Minerals Sector, was not consulted on this scope. Whilst we agree with the key benefits identified such as the need to provide clarity, make better use of resources and provide greater understanding, the failure to consult with key organisations such as the MPA is an opportunity missed. As such, the review may just provide a sticking plaster to the fundamental concerns of this sector. Indeed, we would agree with the comments of the CLA, that the success of the review can only be truly considered in the unintended consequences of a streamlined process. The Residential Landlords Association has raised concern over the “tear it up and start again” approach, however, for certain sectors, a root and branch review of the process may well be the correct approach, looking at whether or not the consenting process is indeed fit for purpose.

The consultation document references special problems in Wales: which Westminster legislation applies (paragraph 1.57). Similar “special problems” apply to specific sectors where the land-use planning system and the mechanism for delivering consents, is now clearly inappropriate.

As referenced under Section 3, we believe a development consent should be all encompassing. The grant of planning permission to undertake a development should facilitate other consents and permits required to undertake that development including where these matters may be subject to the local authority’s consent. These include matters (not exclusively) such as orders under the T&CP legislation (listed buildings, conservation areas footpath orders, etc.), Highways Act consents, EH permits, CROW legislation, Commons legislation, Hedgerow regulations, etc., where

these issues are addressed within the main application and where appropriate, the accompanying ES. Notably CROW legislation may present a health and safety issue to members of the public if not considered at the time of the granting of consent.

Appendix A. We note the absence of any pre-consultation discussions with the minerals sector in determining the scope of the consultation. This is reflected in the level of detail in the consultation document itself and the proposals relating to minerals application. The consequential effects on the mineral permitting process arising from changes to primary legislation have been far reaching which have led us to believe a root and branch review of the permitting process as it applies to minerals developments is long overdue. Unfortunately, the consultation document only proposes tinkering with the system as it affect the minerals permitting process and will do little to improve the effectiveness or efficiency ensuring significant frustrations remain.

CONSULTATION QUESTION 18-6.

We provisionally consider that Schedule 2 to the Planning and Compensation Act 1991 (minerals permissions granted prior to 1 July 1948) and Schedule 13 to the Environment Act 1995 (minerals permissions granted from 1 July 1948 to 22 February 1982) no longer serve any useful purpose, and should not be restated in the Planning Code. Do consultees agree?

Number of responses

18.59 Total: 28 (15 in agreement, 2 equivocal responses, and 11 in disagreement).

Responses in agreement (without further comment)

18.60 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Blaenau Gwent CBC; Planning Inspectorate (PINS); Newport City Council; Torfaen CBC; Mineral Products Association; Law Society; Bridgend CBC; Allan Archer; Keith Bush; PEBA; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Equivocal responses

18.61 *Cardiff Council*: Yes agree that these provisions have now been implemented and are largely historic but in doing so it will be necessary to ensure that definition of the first review date in Schedule 14 of the Environment Act 1995 is maintained as this schedule directly references these provisions when defining the first review date (Section 3 of Schedule 14).

18.62 *Lawyers in Local Government:* It is noted that there are still sites classed as dormant under the above provisions which have not been the subject of an application to determine the conditions, and accordingly the assumptions made are incorrect. LPAs still receive such applications and therefore there should be a method for dealing with such applications within the legislation, or alternatively provision for de-listing of dormant sites within a certain time frame (there may well be objections from land

owners and developers to such provisions). This could be tied in with the Prohibition Orders regime.

Responses disagreeing (with additional comment)

18.63 *Pembrokeshire Coast NPA; National Parks Wales; Carmarthenshire CC; Ceredigion CC; Pembrokeshire CC; Neath Port Talbot CBC; POSW; Monmouthshire CC; Merthyr Tudfil CBC:* Object to this proposal. There are still sites classed as dormant under the provisions of the Planning and Compensation Act 1991 which have not been subject to an application to determine the conditions which should be applied to their operation. Whilst we can agree that the requirements of Schedule 2(1) in relation to 'Applications for Registration' are no longer required, the remainder of the Schedule is still required and does serve a useful purpose.

What do we do with the dormant sites if there is no schedule of requirements? The position is similar in relation to Schedule 13 of the Environment Act 1995. Schedule 13 requires the LPA to produce a first list of sites, and a second list of sites which was done back in 1996. However, the first list included sites classified as dormant and a number of these sites across Wales still have not been subject to applications for the determination of the conditions to be applied to working them. Yes the applications listed as Active Phase 1 and Active Phase 2 have been dealt with but the dormant ones have not. The status of the 'First List' therefore needs to be maintained as far as it relates to dormant sites. The provisions relating to applications for approval of conditions also need to be maintained. Some of the definitions will also need to be maintained.

As the issue relates to 'dormant sites' in the main it should be possible to pull the requirements of the PCA 1991 and the Environment Act 1995 together in future legislation. They could also be integrated into Schedule 14.

18.64 *CLA; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services:* "Live" but inactive mineral extraction permissions should be retained because they have potential value. If they are to be dispensed with, it should only be done if the owner is compensated in some way, either financially or by the offer of an alternative permission elsewhere.

CONSULTATION QUESTION 18-7.

We provisionally propose that the Bill should include:

(1) **the provisions currently in Schedule 14 to the Environment Act 1995 (periodic review of minerals permissions); and**

(2) **those currently in Schedule 9 to the TCPA 1990 (discontinuance of minerals permissions).**

Do consultees agree?

Number of responses

18.65 Total: 29 (28 in agreement, and 1 in disagreement).

Responses in agreement (without further comment)

18.66 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Newport City Council; Torfaen CBC; Law Society; Bridgend CBC; Planning Inspectorate (PINS); RTPI; Allan Archer; Lawyers in Local Government; Keith Bush; PEBA; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Responses in agreement (with additional comment)

18.67 *Pembrokeshire Coast NPA; National Parks Wales; POSW; Monmouthshire CC; Carmarthenshire CC; Ceredigion CC; Pembrokeshire CC; Neath Port Talbot CBC:* Yes. It is essential that these are retained to ensure the Well-being goals in the WFG Act are to be achieved.

18.68 *Cardiff Council*: Yes agree in principle but in relation to Prohibition Orders it would be helpful to provide a clearer definition of what is meant by the term "substantial extent" in Section 2, Schedule 9 of the TCPA 1990. A clearer definition of this term would enable MPA's to bring forward more Prohibition Orders forward for approval by Welsh Ministers.

Responses disagreeing (with additional comment)

18.69 *Mineral Products Association:* The position with regard the 15-year review period should have a default that the review is only undertaken "where necessary", i.e. where it is clearly established that the conditions pertaining to a development are out dated and therefore need to be the subject of a formal mineral review. Legislation changed in England some time ago to reflect this approach.

CONSULTATION QUESTION 18-8.

We provisionally propose that the provisions of the TCPA 1990 in the form in which they apply as modified by the TCP (Minerals) Regulations 1995 (so as to apply to minerals development) should be included in the Bill itself rather than in secondary legislation. Do consultees agree?

Number of responses

18.70 Total: 30 (29 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

18.71 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire. Gwynedd and Ynys Mon Council Legal Services; Douglas Hughes Architects; Planning Inspectorate (PINS); Newport City Council; Torfaen CBC; the Law Society; Bridgend CBC;

Lawyers in Local Government; Keith Bush; Cardiff Council; PEBA; Huw Williams (Geldards)

Responses in agreement (with additional comment)

18.72 *Pembrokeshire Coast NPA; National Parks Wales; POSW; Monmouthshire CC; Carmarthenshire CC; Ceredigion CC; Pembrokeshire CC; Neath Port Talbot CBC:* [Yes/Agreed]. Clarification would be welcomed as it is a long held position (established by case law) that mineral working is an operation rather than a use of land so if any confusion in relation to the status of mineral operations would be welcomed.

18.73 *RTPI & Allan Archer:* Based on the explanation and reasoning in paras 18.70 – 18.73, I agree that it would be more straightforward for the substance of the modifications in the 1995 Regulations to be incorporated into the proposed Planning Bill, subject to the question raised in paragraph 18.72 concerning the definition of development and the need for planning permission, being satisfactorily resolved and that the provisions can be made more understandable.

18.74 *Rhondda Cynon Taf CBC*: Agree with this proposal as well as having the potential to make the law clear on this issue it will remove unnecessary secondary legislation.

Equivocal response

18.75 *Mineral Products Association:* "This section is clearly at odds with the approach taken to minerals development. Case law has established that the winning and working of minerals is not a use of the land, yet consents are determined within the land use planning system. As referenced above, a more open review of the approach to minerals consents may be warranted. One questions how the term "use" can therefore be applied to discontinuance notices specifically to impose the cessation of an operation. We support the inclusion of the compensation provisions under Section 107 within the Bill."

CONSULTATION QUESTION 18-9.

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

Number of responses

18.76 Total: 36 (27 in agreement, 2 equivocal responses, 1 in disagreement, and 6 others).

Responses in agreement (without further comment)

18.77 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion

CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Newport City Council; Torfaen CBC; Pembrokeshire CC; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush, Doug Hughes Architects; Planning Inspectorate (PINS); PEBA

Responses in agreement (with additional comment)

18.78 *Allan Archer:* I think planning officers would welcome a simpler and quicker process for revising fee levels and I'd support this proposal.

18.79 *RTPI:* We would support a simpler and quicker process for revising fee levels. Welsh Ministers should be given the power to provide a scale of fees for actions by themselves and planning authorities, with the intended restriction that income does not exceed the cost of providing the service. The proposed means for setting fees is a straightforward one and the restriction is in accord with the current practice.

18.80 *Pembrokeshire Coast NPA; National Parks Wales: Carmarthenshire CC:* Yes, charge a fee to recoup/offset but not profit. A scale of fees is needed.

18.81 *Sirius Planning:* We would recommend any proposed increases to planning fees should be subject to public consultation to allow a thorough assessment of their impact, taking into account the value of development to the nation.

18.82 *Huw Williams (Geldards)*: Agree, but if the even the theoretical option of Assembly scrutiny is removed then the Minister should be under a consultation obligation if they wish to prescribe new or amended rates. I appreciate this would probably happen anyway but a provision in the Code to this effect would be beneficial and would reassure the development community.

18.83 *Rhondda Cynon Taf CBC*: Agree provided the fees are clearly set out and easy to locate. There should be a consultation before any changes are made though.

Equivocal response

18.84 *The Law Society:* We agree - but if the even the theoretical option of Assembly scrutiny is removed then the Minister should be under a consultation obligation if they wish to prescribe new or amended rates. We appreciate this would probably happen anyway but a provision in the Code to this effect would be beneficial and would reassure the development community.

18.85 *Community Housing Cymru:* Resourcing: We also highlighted in this paper [on pre-commencement conditions] that CHC members were open to an increased planning fee in order to alleviate the disproportionately under-resourced Local Planning Authorities, and we feel that this additional resource would enable more consistency across Local Authorities, especially around pre-application discussions and the confirmation of pre-commencement conditions compliance mentioned above. We would, however, balance this with the fact that there will soon be an additional fee for the proposed SuDS Approving Body (SAB) to be set up within lead local flood authorities (LLFAs), and we are wary of the barriers created by multiple additional fees.

Responses disagreeing (with additional comment)

18.86 *CLA:* No. The CLA fundamentally disagrees with this proposal. Changing/raising planning related fees are a function of the State. They represent a cost on an applicant. This cost reflects the actions carried out by an employee of the State in determining an application. Planning fees, and any proposed increases or decreases, must the subject of public consultation and subsequent scrutiny (SI for affirmative resolution) by Welsh Assembly members. Furthermore, any additional fees levied should be proportionate to the work undertaken by the planning authority (not its value to the applicant), and must be linked to performance by the planning authority to meet reasonable timescales for decision-making.

Other responses

18.87 *Health & Safety Executive:* HSE has no comment on this proposal regarding fees; however, we ask that Welsh Government consider the following. Like other statutory consultees, HSE is receiving reduced government funding and is looking to develop sustainable financial models for the future that are built on cost recovery and growing our commercial income. Currently, HSE does not receive any part of the fees given to the planning authorities for the contribution it makes to assessing land use planning and hazardous substances consent applications and providing its statutory advice. There are also no measures in place, under current planning legislation, that allow HSE to recover its costs for this work.

The Regulatory Futures Review report recommendations expect regulators, like local planning authorities, to work towards full cost recovery for their regulatory activities. To sustain HSE's and other statutory consultees' role in the planning system longer-term and support effective housing delivery, consideration should be given to expanding the current provisions for fees and charges to introduce appropriate cost recovery options for statutory consultees as well as for local planning authorities. We would welcome further discussions with Welsh Government on this important area.

18.88 *Mineral Products Association:* the approach to fees is considered outdated and an applicant should only pay for the service received from the local planning authority. Recent fee rates proposed by NRW are not competitive or at commercial rates based upon the level of experience and efficiency of the service, particularly as this is a captive market. In marine dredging licensing, the applicant only pays for the service delivered and we would welcome the opportunity to explore this approach further with Welsh Government for land-based minerals development. Minerals applications should not be used to fund other services. We must also raise concerns over the abuse by local authorities to use fees in a revenue raising capacity, notably inspection or monitoring fees applicable to minerals developments. The planning bill should be accompanied by regulations that set clearly the scope of monitoring fees and defining appropriate criteria for when an increase in the number of visits may be acceptable.

18.89 *Huw Evans:* All planning application and associated fees should be ring fenced for the planning service. This should be their only source of income as this is the only way in which the management of the service will be forced to operate in a more efficient and business like way. The culture of service delivery through proper performance management is long overdue. Needless negotiations which do not add to the quality of a decision should be stopped together with the nonsense of

requesting applicants to withdraw if the LPA has failed to determine within the prescribed time. It simply results in unnecessary appeals or resubmissions which are counterproductive and do not lead to efficiency savings.

18.90 *Canal & River Trust:* We are however particularly concerned that a unified consent regime could result in fees being charged for works to listed buildings and in conservation areas, that previously didn't attract a fee. In Wales, the Trust owns 223 listed buildings. We have calculated that if listed building consent were to be required 2 or 3 times over the lifetime of one of our listed assets, and this, for example, attracted a fee similar to that of a current householder planning application (£190), this would cost the Trust an additional £85,460 or £128,190. The introduction of such fees would divert income away from our charitable activities which, given the multi-purpose nature of the waterways, have an important role to play in helping to achieve all 7 of the well-being goals set out in the Well-being of Future Generations (Wales) Act 2015. Whatever the regime adopted for the consideration of works currently covered by listed buildings and conservation area consent it is imperative that our estate has a permanent exemption from application fees for work to our heritage structures, to avoid what we suspect would be the unintended consequence illustrated above. As such we consider that it is important for Welsh Ministers to maintain their ability to consider the categories of development or circumstances when the fee regulations do not apply.

18.91 *Blaenau Gwent CBC:* Fees for LBC and TPO applications. In acknowledging that fees are the subject of a separate piece of work with WG and PAS, the paper does not fully acknowledge the resources required to implement these regulatory provisions which currently do not attract a fee.

18.92 *Ceredigion County Council:* seeks further consideration of full cost recovery for development management, in particular noting the proposals at 8.1 for one consolidated Planning application with certain matters reserved for subsequent detail / permission and existing requirements to discharge conditions and maintain a live planning consent;

CONSULTATION QUESTION 18-10.

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

Number of responses

18.93 Total: 29 (29 in agreement).

Responses in agreement (without further comment)

18.94 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; CLA; POSW; Monmouthshire CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Planning Inspectorate (PINS); Newport City Council; Torfaen CBC; Neath Port Talbot CBC; Lawyers in Local Government; Keith Bush; Pembrokeshire Coast NPA; National Parks Wales: Allan Archer; RTPI; Cardiff Council; PEBA

Responses in agreement (with additional comment)

18.95 *Carmarthenshire CC:* Agreed. One approach to settling disputes re compensation regardless if what planning function it relates to.

18.96 *The Law Society & Huw Williams (Geldards):* We agree that a single provision providing recourse to the Lands Chamber is appropriate, provides consistency and simplifies the Code.

18.97 *Canal & River Trust:* We agree with the proposal. The introduction of the single provision would simplify the provisions relating to compensation.

18.98 *Rhondda Cynon Taf CBC*: Agree this would make the issue of who has responsibility for determining compensation disputes clear to all.

CONSULTATION QUESTION 18-11.

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

Number of responses

18.99 Total: 33 (23 in agreement, 9 equivocal responses, and 1 in disagreement).

Responses in agreement (without further comment)

18.100 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; CLA; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Newport City Council; Torfaen CBC; Bridgend CBC; Canal & River Trust; Lawyers in Local Government; Cardiff Council; PEBA

Responses in agreement (with additional comment)

18.101 *Chartered Institute for Archaeologists:* Yes. It would be consistent with CIfA's Code of conduct (see http://www.archaeologists.net/sites/default/files/CodesofConduct.pdf).

18.102 *The Law Society & Huw Williams (Geldards):* We agree. This is frequently done already on an informal basis and in accordance with advice form professional bodies. We suggest a power to specify such a requirement in the relevant procedural rules would be the appropriate way to proceed.

18.103 *RTPI, Allan Archer:* This proposal should increase confidence in professional evidence and would be consistent with the RTPI's Code of Practice

18.104 *Health & Safety Executive:* HSE supports the proposal in principle, but questions the position where another person is required to present evidence. An example would be where an HSE specialist risk assessor prepares a 'proof of evidence' but is then unable to attend an enquiry due to sickness, and his/her evidence is presented by another specialist risk assessor. Could you please provide clarification on this point?

18.105 *Natural Resources Wales:* We would agree with the provision to secure a statement of truth as part of proceedings.

18.106 *Rhondda Cynon Taf CBC:* Agree but do not agree that lay evidence should be excluded. It should be a requirement that all statements submitted in planning proceedings be accompanied by a statement of truth be them by expert or lay person. If it is clear in the Bill and the wording is set out in regulations as proposed it should not make a difference that a person is unrepresented. It seems reasonable that there should be a requirement that all statements submitted are true to that persons knowledge.

Equivocal responses

18.107 *Pembrokeshire Coast NPA; National Parks Wales: POSW; Monmouthshire CC*; *Ceredigion CC: Neath Port Talbot CBC:* Yes, but will it provide the outcome required in practice?

18.108 *Carmarthenshire CC:* Agree that requiring statements of truth to be submitted alongside other materials to be considered by Inspectors or at other proceedings would be useful but will it provide the outcome required in practice?

18.109 *Merthyr Tudfil CBC:* ? What would it add?

18.110 *Planning Inspectorate (PINS):* This raised some questions, though these would mainly be for the secondary legislation suggested:

- If a statement of truth is required for expert evidence, how would 'expert' be defined? The consultation suggests that such statements would not be required from lay people, so some definition would be needed.
- What would the consequences be if an 'expert' did not include a statement of truth? (PINS could not turn away evidence in that situation, as anyone can make representations as an interested party).
- If a distinction was made between experts and lay people, for the purpose of establishing when a SoT would be required, would that create the impression that 'expert' evidence carries more weight? This would not be

the case as the weight to be given to evidence is decided by the Inspector on a case-by-case basis.

- Given the above and the fact that, anecdotally, this is not presenting a significant problem at present, it is not clear what the benefit of a statutory requirement would be, over the current best practice approach.

Response disagreeing

18.111 *Keith Bush:* Disagree – there is no basis to believe that a statement of this kind would improve the quality of evidence. And it is not clear the circumstances under which there would be a power to ask for such a statement.

CONSULTATION QUESTION 18-12.

We provisionally propose that the power to make orders as to the costs of parties to proceedings, currently in section 322C(6) of the TCPA 1990, should be amplified to make explicit that such an order is only to be made where:

(1) **one party to an appeal has behaved unreasonably; and**

(2) **that unreasonable behaviour has led other parties to incur unnecessary or wasted expense.**

Do consultees agree?

Number of responses

18.112 Total: 29 (27 in agreement, and 2 in agreement subject to conditions).

Responses in agreement (without further comment)

18.113 RTPI; Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Pembrokeshire CC; Home Builders Federation; Alan Archer; Keith Bush; Cardiff Council

Responses in agreement (with additional comment)

18.114 *Planning Inspectorate (PINS):* PINS raises no objection to this, and agree that it would be clearer for those not familiar with the current process.

18.115 *Pembrokeshire Coast NPA; National Parks Wales; POSW; Monmouthshire CC; Ceredigion CC; Neath Port Talbot CBC:* Agreed, there is currently confusion and time wasting.

18.116 *Carmarthenshire CC:* Agreed, there is currently confusion and time wasting. The new wording will ensure that costs only relate to unreasonable behaviour that has led to the other party incurring unnecessary or wasted expense.

18.117 *Barratt & David Wilson Homes South Wales:* We supportive the inclusion of the principle that claimants should be allowed to claim costs when the opposing party has acted unreasonably.

18.118 *Sirius Planning:* We support the proposal to make explicit when an order on costs can be made; this adds a greater level of certainty for applicants.

18.119 *The Law Society & Huw Williams (Geldards):* I agree that the basic principle of costs should be stated in the Code.

18.120 *PEBA*: Yes – it will need to be made clear that in this context 'unreasonable' is used in the ordinary sense of that word.

18.121 *Rhondda Cynon Taf CBC*: Agree as it places on a statutory footing the current principle of costs in planning proceedings and makes it clear to all parties.

Responses in agreement (subject to conditions)

18.122 *Mineral Products Association:* Under point (1) it would be beneficial to identify which circumstances could be considered "unreasonable" and this should include decisions made against officer recommendation. This would ensure spurious or political decisions are eliminated. Whilst we recognise the planning process is democratic, applicants for controversial development will routinely avoid periods leading up to local elections.

18.123 *Friends of the Earth Cymru:* We consider that it should be made clear that rule 6 parties will not be exposed to any costs.

CONSULTATION QUESTION 18-13.

We provisionally propose that the Planning Code should incorporate provisions equivalent to those currently in:

(1) **section 276 of the Public Health Act 1936 (the powers of a planning authority to sell materials removed in executing works);**

(2) **section 289 of that Act (power to require the occupier of any premises not to prevent works being carried out); and**

(3) **section 294 of that Act (limit on the liability of landlords and agents in respect of expenses recoverable),**

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

Number of responses

18.124 Total: 28 (27 in agreement, and 1 equivocal response).

Responses strongly in agreement

18.125 *Pembrokeshire Coast NPA; National Parks Wales; POSW; Monmouthshire CC; Ceredigion CC:* Yes, long overdue

Responses in agreement (without further comment)

18.126 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Planning Inspectorate (PINS); Newport City Council; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Allan Archer; Cardiff Council; PEBA; Huw Williams (Geldards)

Responses in agreement (with additional comment)

18.127 *Carmarthenshire CC:* Agreed. This relates to discontinuance notices, enforcement notices, tree replacement notices and unsightly land notices. It involves ability for LA to sell materials recovered from a site, require that an owner/occupier does not prevent the LA from carrying out works to a site that have been agreed as necessary and place a limit on the liability of landlords/agents in respect of expenses they can reclaim.

18.128 *Rhondda Cynon Taf CBC*: Yes again it is one of the purposes of the codification exercise to clarify the law. By placing these provisions in the Bill it makes it clear and saves the time and expense reviewing other legislation to establish what the powers are applied by reference.

Equivocal responses

18.129 *Mineral Products Association:* We note the proposal to incorporate the provision of Section 276 of the Public Health Act 1936, but we would seek to ensure that the powers of the planning authority to sell materials removed in executing works are subject to the same level of environmental controls as non-public bodies.

CONSULTATION QUESTION 18-14.

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

Number of responses

18.130 Total: 24 (11 without any suggestions and 13 with suggestions).

Responses which make no suggestions

18.131 Allan Archer; Caerphilly CBC; POSW South East Wales; Pembrokeshire CC; Planning Inspectorate (PINS); Neath Port Talbot CBC; Torfaen CBC; Keith Bush; Cardiff Council; PEBA; Rhondda Cynon Taf CBC

Adjacent, abutting

18.132 *Newport City Council:* Adjacent

18.133 *Blaenau Gwent CBC:* It would assist enormously if the Code provided a definition/guidance on the terms contained in para 18.101 such as “adjacent” and “abutting” in addition to those terms suggested as requiring definition elsewhere.

Agriculture and horticulture

18.134 *Andrew Ferguson:* It would also be useful to clarify that horticulture (within the definition of agriculture) does not relate to a person solely or largely involved with grass-cutting. This could otherwise result in a landscape gardener/ handyman who mows lawns to be considered as an “agricultural worker”.

18.135 *Merthyr Tudfil CBC:* Horsiculture

Ancillary

18.136 *Andrew Ferguson:* Definitions – the term “ancillary” is often used in planning jargon (and is used in this consultation), and incorrectly used interchangeably with the term incidental. The term used in legislation (in the 1990 Act and UCO for example) is “ordinarily incidental” which doesn’t necessarily have the same meaning as ancillary. Ancillary is the predominant form used in terminology and it may be worthwhile considering changing this term and/ or clarifying what both definitions means

Building

18.137 *Arup:* The definition of a building continues to cause confusion and subsequently affects how the GPDO is applied; resulting in proposals for plant and machinery (for example) being treated as building operations requiring planning consent. Such structures are explicitly excluded from the definition of what constitutes a building operation within the meaning of the GPDO and therefore should receive greater clarity on how it should be interpreted in the context of both the TCPA and GPDO.

18.138 *Bridgend CBC:* Definition of “building” to exclude any structure such as a lamp post/pole.

Commencement of development

18.139 *Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Lawyers in Local Government:* It would be useful to both LPAs and developers to have certainty by way of statutory definition as to what is required to commence development (Malvern Hills District Council v Secretary of State for the Environment [1982]).

Control of land

18.140 *Health & Safety Executive:* There are several references in TCPA 1990 and other planning legislation to “control of land”. For example;

- S.72 of the TCPA 1990 refers to “land under the control of the applicant…”, whilst s.179 (4) refers to “a person who has control of or an interest in the land …” and s.187A (2) (b) refers to “any person having control of the land”.

- Paragraph (w) of Sch.4 to the Town and Country Planning (Development Management Procedure) (Wales) Order 2012 refers to “the person who is in control of the land on which any existing establishment in question is located”.

- The Planning (Hazardous Substances) Regulations 2015 contains several references to “the person in control of the land to which the (application/direction/consent/claim form/notice) relates”.

“Control of the land” is not defined in legislation, and it can be confusing as to what it actually means. Consequently, it can also be unclear, e.g. where land is leased or sublet, who the person “in control of the land” is. The situation becomes less clear when an application for secondary consent such as hazardous substances consent (HSC) is made at the same time as an application for planning permission; this is because HSC is granted in respect of an area of land rather than to the applicant. It would be helpful if consideration could be given to including either a definition of “control of land” or some form of guidance in the code.

Domestic curtilage

18.141 *Andrew Ferguson:* It may also be worth clarifying that “domestic curtilage” is not a use of land within the Bill so there is no uncertainty. This still causes confusion somehow. It is queried how it is considered that the definition of curtilage can be clarified and yet the definition of building cannot (which both relate to various tests as outlined in case law). These would appear to be very similar issues in nature.

Enclosures

18.142 *Arup:* The definition of enclosures is usually taken to mean structures including fences, gates and walls etc. However, further clarity on the definition of the term and whether it could extend to include metal/composite housings that enclose plant and/or machinery would help improve the consistency of the GPDO’s application between local planning authorities.

For example, at present such enclosures are being interpreted both as comprising the formation of buildings requiring planning consent and as non-building operations falling under permitted development rights, creating inconsistencies when trying to establish a definitive position on permitted development rights and therefore clarity is welcomed.

Engineering operation

18.143 *CLA:* We have already responded that we do not believe that “engineering operation” should be defined on the face of the Bill. However, perhaps guidance could set out what is not an engineering operation or such operations as might be considered ordinarily to be de minimis.

Ground Level

18.144 *Arup:* The definition of ground level is usually taken to mean the level of the ground directly adjacent to the structure in question or in the case of uneven topography the highest part of the land adjacent to the structure. However, this definition is only really given in the context of 'traditional above ground structures' such as fences, walls and building extensions etc.

It is unclear how this definition relates to 'traditional below ground structures' such as pipes and gas mains etc. which at one point or another may emerge from the ground. For example, statutory undertakers are permitted to carry on development that is not above ground level, but in certain scenarios development will break above ground level (in layman terms) albeit in the context of sites with uneven topography may still be considered below ground level in planning terms. Greater clarity should be given on the definition of ground level and the relationship with uneven topography and the concept of natural ground level in the context of the GPDO.

Highways

18.145 *Arup:* The definition of a highway is not provided for the purposes of the GPDO but greater clarity should be given on its intended meaning in order to avoid undue restriction on site enclosures (primarily fences, gates and walls) that abut low risk roadways, such as those without a public right of way. For example, such an approach would benefit those statutory undertakers with an interest in land requiring security fencing and other enclosures that may contravene the height limitation imposed on such structures within the GPDO but are intrinsic to the safe operation of their undertaking.

18.146 *Blaenau Gwent CBC:* It would assist enormously if the Code provided a definition/guidance on the terms contained in para 18.101 such as "highway" in addition to those terms suggested as requiring definition elsewhere.

18.147 *Institution of Civil Engineers Wales:* Yes. Section 328 of the Highways Act 1980 defines that, except where the context otherwise requires, "highway" means the whole or a part of a highway other than a ferry or waterway. The difficulty with this definition is that it does not explain the width of any highway. The width is normally taken to mean the width between any boundary walls or fences to the highway, which would include any highway verge or other waste adjacent to the paved width, Difficulties can arise where the highway crosses common land, where there are no boundary walls or fences, but it is again usual to assume that a highway verge of some width is also present. The obvious difficulty with this is what width can this verge be taken to be where no boundary walls or fences exist. It would be most useful both to Planners and Highway Engineers if this verge width could be defined, perhaps to be a width of say 3 metres each side?

Implementation of consent

18.148 *Bridgend CBC:* Definition of "implementation" of a consent – e.g. works carried out requiring consent in their own right.

Minerals

18.149 *Mineral Products Association:* We note subsequent proposals to clarify and simplify such definitions as dwelling house. Further terms which need clarification and could usefully be included in a definition of terms are

- 'Mineral resource': Natural concentrations of minerals, deposits or bodies of rock that are, or may become, of potential economic interest due to their inherent properties. The mineral will also be present in sufficient quantity to make it of intrinsic economic interest.

- 'Mineral reserve': Mineral resources with the benefit of planning permission for extraction.

Plant and Machinery

18.150 *Arup:* The definition of plant and machinery is given as 'in the nature of plant' and 'in the nature of machinery' which is ambigu`ous and leaves significant scope for interpretation between local planning authorities. These terms should receive greater clarity so that it is clear what type of structures should be treated as such in the context of the TCPA and GPDO.

Renewing of Services

18.151 *Arup:* Part 10 of the GPDO gives extensive permitted development rights for the repair and renewal of service infrastructure. It is not clear whether the term renewing is inclusive of replacement and also how much flexibility is inherent in the type of works permitted. For example, in renewing an underground pipe it may be necessary, due to engineering constraints, that the pipe needs to be re-laid on an alternative alignment. Subsequently, it is unclear whether the fact there is a change in alignment would preclude the use of permitted development rights. Furthermore, Part 10 places no limitation on whether works to services are below or above ground. Therefore, it would suggest replacing on an alternative above ground alignment should be treated no differently.

General comment

18.152 *Arup:* Definition of Terms: Underpinning a more streamlined and consistent planning system should be a clear and concise definition of terms in order to restrict ambiguity and promote consistent interpretation and (by extension) decision making between local planning authorities, and higher authorities including the Planning Inspectorate. An area where there is ongoing confusion relates to the often complex process of establishing the intended meaning of a given term, having to cross reference and link together several pieces of legislation (that may be unrelated to planning legislation) in order to reach a reliable definition. Such a process introduces too many variables and often leads to conflicting interpretation and application of legislative terms. Within legislation, the number of terms requiring clear and concise definition for the purposes of correctly administering the planning system is significant and it would be unfeasible to provide an opinion on the correct interpretation of each and every term. However, [the suggestions above] are a number of terms that Arup has typically found to be

troublesome when dealing with local planning authorities in recent times and which could be clarified under the proposed reforms.

18.153 *RTPI Cymru:* A glossary of agreed terms in English and Welsh could prove useful, particularly given the discussion about the English terms 'dwelling' and 'dwelling-house' in comparison to the Welsh term 'tŷ annedd' in paragraph 18.120 of the consultation document, which illustrates a case in point.

CONSULTATION QUESTION 18-15.

We provisionally propose that:

(1) **the provisions of the English language version of the Bill equivalent to sections 55, 171, 183, 196A and 214B and Schedule 3 of the TCPA 1990 should be framed by reference to a "dwelling", rather than a "dwellinghouse", and**

(2) **the interpretation section of the Bill should include a definition of the term "dwelling" to the effect that it includes a house and a flat, and a definition of the term "flat".**

Do consultees agree?

Number of responses

18.154 Total: 33 (32 in agreement, and 1 equivocal response).

Responses in agreement (without further comment)

18.155 Planning Inspectorate (PINS): Penstrowed CC; Caerphilly CBC; POSW South East Wales; CLA; Merthyr Tudfil CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Home Builders Federation; Newport City Council; Torfaen CBC; Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Pembrokeshire Coast NPA; National Parks Wales; POSW; Monmouthshire CC; Carmarthenshire CC; Ceredigion CC; Pembrokeshire CC

Responses in agreement (with additional comment)

18.156 *Institution of Civil Engineers Wales:* Yes. "Dwelling Unit" might be considered to be more obviously descriptive than "Dwelling"?

18.157 *RTPI & Allan Archer:* The analysis in the LC report seems to put forward a very persuasive case for the rationalisation of the differing definitions and on that basis I can see no reason to disagree with the proposals – I thought the comment about 'ty annedd' was interesting and wonder whether this proposal also makes sense in the Welsh language.

18.158 *Blaenau Gwent CBC:* Agree but what are the implications for the Welsh version?

18.159 *Radio Society of Great Britain:* (2) Although the RSGB does not oppose the suggestions that a flat should be included within the definition of 'dwelling' account will need to be taken of the fact that satellite dishes on not permitted on flats to preclude visual cluttering on the south facing front of flatted blocks.

18.160 *Natural Resources Wales:* (2) For the avoidance of doubt, the definition could be usefully expanded to include maisonettes, apartments and self-contained annexes.

18.161 *PEBA:* Yes – the proposed definition of "dwelling" is a sensible standardisation of the meaning of these terms.

18.162 *Rhondda Cynon Taf CBC*: Agree as this seems like a sensible approach. A dwelling is a much more commonly used and understood term than dwellinghouse. The clarification that a dwelling includes both a house and a flat is welcomed.

18.163 *Newport City Council:* The definition of "dwelling" should apply to all structures in which people are living whether fixed, mobile or temporary.

Equivocal responses

18.164 *Cardiff Council*: Noted but could there be an unintended consequence whereby a flat may gain some permitted development rights.

CONSULTATION QUESTION 18-16.

We provisionally consider that it would be helpful for the Bill to include a provision to the effect that the curtilage of a building is the land closely associated with it, and that the question of whether one structure is within the "curtilage" of a building is to be determined with regard to:

(1) **the physical 'layout' of the building and the structure;**

(2) **their ownership, past and present; and**

(3) **their use and function, past and present.**

Do consultees agree?

Number of responses

18.165 Total: 31 (19 in agreement, 6 equivocal response, 4 agreeing in principle only, and 2 in disagreement)

Responses in agreement (without further comment)

18.166 Institution of Civil Engineers Wales; Penstrowed CC; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Newport City Council; Torfaen CBC; Law Society; Bridgend CBC: Lawyers in Local Government; Huw Williams (Geldards)

Responses in agreement (with additional comment)

18.167 *Chartered Institute for Archaeologists:* Yes. This acknowledges the *Calderdale* caselaw, but, to improve upon the current position, would need to go further. For instance, it would be helpful to require all new listings to define the curtilage for the building in question.

18.168 *Central Association of Agricultural Valuers:* We agree that a definition of curtilage would be helpful because the word is not used in an everyday context. We are keen that the definition looks at principles only and that each case should continue to be determined individually. We believe it may be more appropriate for a definition to be provided in guidance rather than statute. For consistency, it should have regard to the body of case law on this point under legislation such as that for Council Tax and Principal Private Residence Relief for Capital Gains Tax.

18.169 *PINS:* PINS agrees with the approach proposed. Would also draw attention to Burford v SSCLG & Test Valley BC [2017] EWHC 1493 (Admin), which provides a recent affirmation of the criteria laid down in *Calderdale*, as applied to a non-listed building case.

18.170 *Caerphilly CBC; POSW South East Wales:* It would be helpful to address this but further consideration needs to be given to the wording. 'Curtilage' tends to be defined as the area immediately adjacent to and associated with the use of a building. That allows LPAs to limit the use of permitted development rights at houses with extremely large, parkland style gardens. The proposed definition would not address that situation.

18.171 *PEBA*: Yes – a sensible clarification of a rather elusive concept.

18.172 *Rhondda Cynon Taf CBC*: Agree. Curtilage is a frequently used term in planning law but has no statutory definition. It is accepted that a precise definition is unlikely to be possible as it will depend on the facts of each case but by prescribing the factors that should be considered when making a determination as to the curtilage of a building will assist both the lay person and planning practitioner.

Equivocal responses

18.173 *Cardiff Council*: Important to note the content of the response.

18.174 *Ceredigion CC; Pembrokeshire CC:* Not convinced that a definition of curtilage would be easy to describe and could add to confusion.

18.175 *Pembrokeshire Coast NPA; National Parks Wales; Carmarthenshire CC:* Not convinced that a definition of curtilage would be easy to describe and could add to confusion rather than clarity as often the history of the buildings and their relationship is paramount.

Responses agreeing in principle (with additional comment)

18.176 *Neath Port Talbot CBC:* A definition would be helpful but it is acknowledged that this is easier said than done. The three criteria are helpful but other issues shouldn't be precluded as cases will always arise which will not conform to these criteria.

18.177 *RTPI:* While we support this proposal in principle, we have some concerns about the proposal. Firstly, the definition of the curtilage of a building as simply the land closely associated with it is insufficient on its own to provide a satisfactory definition. We would support the addition of some basic principles to be applied in establishing the extent of the curtilage in any particular case. Secondly, the proposal goes on to have regard to physical layout, ownership, use and function. As proposed, this appears rather narrow and directed to the particular question of whether a structure lies within the curtilage of a building, while the question which would be of wider applicability is 'what is the extent of the curtilage of a building?'.

18.178 The wording would need to be capable of being applied to the many different instances where the definition of the curtilage comes into play.

18.179 *Allan Archer:* I support, if it is possible to do this with clarity and certainty, the inclusion of a definition of 'curtilage' within the proposed Bill but while I think that what is proposed goes some way towards that I also have some queries about the proposal which could assist in improving the proposed definition.

As a starting point, the definition of the curtilage of a building as simply the land closely associated with it is, I think, insufficient on its own to provide a satisfactory definition and I support the addition of some basic principles to be applied in establishing the extent of the curtilage in any particular case. Essentially these principles are concerned with physical layout, ownership, use and function but I consider that, as proposed, they are rather narrowly directed to the particular (listed building) question of whether a structure lies within the curtilage of a building while the question which would be of wider applicability (to consideration of PD rights, for example) is 'what is the extent of the curtilage of a building?'. The first type of case I have some experience of concerns buildings in rural locations. Often, an excessive (to my mind) amount of time and expense can be taken up with arguments and specialist submissions about the definition and extent of the curtilage, especially where listed buildings are concerned.

Having also recently read all of Martin Goodall's blog posts on the subject of curtilage, these clearly underline the complexity of the matter and also the potential difficulties with listed buildings and large houses in the countryside. On the basis of my own experience with this type of case I have some sympathy with the comments of the CLA about the difficulties of defining a curtilage for buildings in a rural context.

It seems to me that, so far as listed buildings are concerned, it would be far simpler if the curtilage over which the protection of listing applies (i.e. within which the listed building and fixtures and buildings within the curtilage are protected) was defined as part of the listing. If there were to be disagreements they could be considered as part of the listing process and, once defined, both owners and regulatory authorities can then be absolutely clear about the extent of protection.

The second type of case I have some experience of involves the interpretation of permitted development provisions. The question here is not whether a building or structure was within the curtilage but what land forms part of the curtilage for the purposes of interpreting PD rights. In some cases, this also took up much time and expense (where additional specialist advice was sought).

Therefore, I fully support the attempt to provide some greater clarity and more detailed guidance on the factors and principles to be considered. My concern with the proposal, based on my experience, is that the wording should be capable of being applied to the different instances where the definition of the curtilage comes into play.

18.180 *Historic Houses Association:* We support the clarification of curtilage in principle, but we do not think this proposal would necessarily achieve that. If anything, we believe the proposal as currently set out could heighten existing confusion around curtilage. Interrogating statute and case law would indicate that the key tests that currently determine whether structures fall within the curtilage of a listed building are: 1/ is there physical proximity to the main listed building?; 2/ are/were they in the same ownership?; 3/ is the structure of ancillary use to the main listed building?; 4/ is the structure pre-1948? These are not factors to be weighed in the balance – they are generally clear cut 'yes or no' questions, with the exception of 1 ('is there physical proximity to the main listed building?'), which is not made any clearer through the consultation document's proposal anyway.

We propose, therefore, that clarity on curtilage might be better achieved through setting out the position above in the proposed new Planning Code and associated guidance. This guidance should facilitate alterations to structures within the curtilage of a listed building that are of no historic significance and have no beneficial effect on the listed building.

Clarity on curtilage is hugely important to HHA members, most of whom care for more than one historic building as part of their property. Of these members, while some have a listing which explicitly details the heritage included in the listing, other members own or care for properties where the listing of the main house extends to an unspecified curtilage that could or could not include a number of objects and structures.

Ultimately, if objects and structures are of historic importance they should be listed in their own right; if they are not of their own historic importance, but do contribute to the experience of the main listed building, then they would be protected as part of a place's setting rather than curtilage.

Responses disagreeing

18.181 *CLA:* No. The CLA strongly disagrees with this specific proposal. The CLA does support the clarification of curtilage in principle, but in guidance rather than in legislation. We very strongly disagree with this specific proposal, which would worsen the problem it claims to ameliorate, and damage the planning and listed building consent systems.

1. There is a case for clarifying curtilage, because it can cause confusion, though as below that confusion is much more artificial than real. In real

cases on the ground, the CLA can usually give clear answers to members as to what is in the curtilage of a building and what is not.

2. The combination of statute and case law on curtilage, though it may currently take a little time to assimilate, is actually quite clear. In summary, it is well established that land or fixed structures are in the curtilage of a building only if they (i) are/were in the same ownership; and (ii) have/had a functional relationship with the building, by being ancillary to it; and (iii) (listed buildings only) the structure must be pre-1948; and (iv) there must be some degree of physical proximity. Of these (i) and (ii) and (iii) are not 'factors' to be 'weighed in a balance', they are (in nearly all cases) black or white. Only (iv) potentially gives rise to real uncertainty (primarily, is this 'test' 'failed' beyond say 100m, or 200m?), but codification might not address that, and this consultation proposal of course does not.

3. This generally clear picture is however not set out in the 1990 Acts, or in guidance, and has to be put together by looking at textbooks and case law. The CLA has the resource to do that, but most applicants do not.

4. In principle, therefore, it would be helpful to set out the position summarised in paragraph 2 above, but in guidance rather than in legislation.

5. In addition, the failure to explain what curtilage means, and the widespread perception of uncertainty which has existed for decades, and the resulting waste of scarce resources in local authorities and elsewhere, harm the planning system, and especially the LBC system: uncertainty about listed building 'curtilage listing' is notorious, a classic criticism even from those who strongly support heritage protection, and a stick with which the whole system is routinely beaten by those who want to undermine it. There is an argument for protecting 'curtilage structures', but extending the strict criminal law protection of listed buildings to clearly-separate structures not mentioned in list descriptions, and without a test of 'special interest', is clearly inherently problematic, and it is incumbent on government to explain this clearly, to ensure it is as proportionate as the law allows, and to minimise the problems it causes. The Calderdale approach manifestly does not achieve that.

6. The proposal suggested in this consultation is therefore not only unhelpful, but perverse. It might damage the considerable degree of certainty which currently exists, as set out in paragraph 2 above. It should definitely not be taken forward in any form. The approach suggested in paragraph 4 above should be taken instead.

18.182 *Keith Bush:* Disagree – "curtilage" is a concept which is so dependent on its practical surroundings, that it there is nothing to win (and a lot to lose) by trying to define a term which has already been considered by the courts.

CONSULTATION QUESTION 18-17.

We provisionally propose that the interpretation section of the Bill contain definitions of the following terms:

(1) **"agriculture" and "agricultural", along the lines of the definition currently in section 336 of the TCPA 1990, with the addition of a reference to farming in line with those currently in section 147 and 171; and**

(2) **"agricultural land" and "agricultural unit", broadly in line with the definition in Part 6 of Schedule 2 to the GPDO;**

and we provisionally propose that no further definitions of those terms be provided in relation to purchase notices and blight notices. Do consultees agree?

Number of responses

18.183 Total: 27 (20 in agreement, 6 equivocal responses, and 1 in disagreement).

Responses in agreement (without further comment)

18.184 Caerphilly CBC; Planning Inspectorate (PINS); POSW South East Wales; CLA; Merthyr Tudfil CBC; Blaenau Gwent CBC; Ceredigion CC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Newport City Council; Torfaen CBC; The Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Cardiff Council; Huw Williams (Geldards); Rhondda Cynon Taf CBC; PEBA

Equivocal responses

18.185 *Pembrokeshire Coast NPA; National Parks Wales*; *Carmarthenshire CC*: Is this the opportunity to clarify the keeping or the grazing of horses on land?

18.186 *RTPI, Allan Archer:* I think the proposal to carry forward current definitions is OK but, before giving an unqualified agreement, I would like to know what changes might arise from the use of the phrases 'along the lines of' and broadly in line with'.

18.187 *Central Association of Agricultural Valuers:* We agree that it would be helpful to have a definition of agriculture within the new code and see the merits of retaining a definition that has been the subject of decided cases for planning and under the closely allied definitions for agricultural tenancy law. However, this is an opportunity for that definition to recognise the increasingly wide range of activities that may now be considered agricultural, in particular actions to manage land for ecological benefit or to provide landscape scale amenity value.

Responses disagreeing

18.188 *Keith Bush:* Disagree – "agriculture" is a common term which should be interpreted on the basis of common sense, and on the basis of the courts' previous decisions.

CONSULTATION QUESTION 18-18.

We provisionally propose that the following provisions, which appear to be obsolete or redundant, should not be included in the Planning Code:

(1) **section 314 of the TCPA 1990 (apportionment of expenses by county councils);**

(2) **section 335 of the TCPA 1990 (relationship between planning legislation and other legislation in force in 1947); and**

(3) **Schedule 16 to the TCPA 1990 (provisions of the Act applied or modified by various other provisions in the Act).**

Do consultees agree?

Number of responses

18.189 Total: 24 (24 in agreement).

Responses in agreement (without further comment)

18.190 Institution of Civil Engineers Wales; Caerphilly CBC; POSW South East Wales; Merthyr Tudfil CBC; Blaenau Gwent CBC; Flintshire, Denbighshire, Gwynedd and Ynys Mon Council Legal Services; Monmouth TC; Pembrokeshire CC; Planning Inspectorate (PINS); Newport City Council; Torfaen CBC; Law Society; Neath Port Talbot CBC; Bridgend CBC; Lawyers in Local Government; Keith Bush; Cardiff Council; PEBA; Huw Williams (Geldards); Rhondda Cynon Taf CBC

Responses in agreement (subject to conditions)

18.191 *Pembrokeshire Coast NPA; National Parks Wales:* But would the provision for a selection of an area basis be appropriate for example the use of such within a National Park? Would we want to keep options open to enable different council tax returns in different areas? We have issues with 'conservation grade' highway works being reduced to utilitarian examples on the basis of cost.

18.192 *RTPI; Allan Archer:* I agree, subject to one query, that, based on the explanation and reasoning set out in paragraphs 18.158 – 18.160 and the information in footnote 109, these would, should earlier recommendations be accepted and proceeded with, appear to be obsolete or redundant provisions and should not be included in the new Code. However I am not clear what is proposed in relation to s318 arising from paras 18.48 and 18.49 relating to ecclesiastical property and note that para 18.49, suggests that s318 needs to be retained to take account of Church of England parishes lying partly in Wales so my query is whether that requires Sch 16 to be retained also for those cases?

CHAPTER 18: GENERAL COMMENTS

18.193 *Bay of Colwyn Town Council:* The Council feels that it is not only essential to define terms such as Supplementary Planning Guidance and Material Consideration but there is also a clear need for a Glossary of Planning Terms.

The author of the report on the Law Commission's Consultation Paper on Planning Law in Wales by a member of the General Purpose and Planning Committee wrote: I see one glaring omission in this report. I have not seen any reference to Supplementary Planning Guidance notes (SPG). Whilst I am aware that a SPG is currently a material planning consideration, I cannot see any mention on the status of SPGs in Planning Law.

I have searched for Supplementary Planning Guidance and SPG in both the Summary and the full Consultation Paper without success. Supplementary Planning Guidance notes (SPG) should be given status in Planning Law

18.194 Another respondent countered this view with: Although, as you say, Supplementary Planning Guidance is not mentioned I believe it should be retained and not included in planning law. They are, by definition, extra instruments of advice to Planning Officers to assist in coming to a decision and allows him/her a degree of discretion. They are meant to be "aspirations" and aspirations cannot always be achieved. There must be many instances where desirable developments would not take place if planning regulations were strictly adhered to. We do not live in a totalitarian state where everything is seen only in black and white, individuality and freedom of thought and action are ruthlessly prohibited and everything must be done 'According to the book'. In a free democracy there must always be room for individual thought and freedom to make decisions according to special or extenuating circumstances.

The discussion on this topic felt that requesting a Glossary of Planning Terms to give clarity about the status of SPG as a 'material consideration', together with a suitable definition of material consideration, was a suitable and realistic compromise.

18.195 *National Grid*: The suggested revisions are unlikely to affect the operation of the business, but the proposed contribution to the simplification of Welsh planning is supported in principle. [18-5 - 18-7, 18-10, 18-13, 18-15 - 18-17]

18.196 *Mineral Products Association:* In relation to paragraph 18.39, we have highlighted above, our concerns of local authority developments, particularly where breaches of planning control occur, notably for temporary buildings.

Appendix A: Complete list of respondents to Consultation Paper

[See Introduction. This list includes the stakeholders whom we met during the consultation period or who submitted written responses to the Consultation Paper . Entries within each group are in alphabetical order. All of those listed submitted written responses except those marked with an asterisk, who met with the Commission, or hosted an event attended by it.]

CENTRAL GOVERNMENT

Ministry of Housing, Communities, and Local Government *

Planning Inspectorate (PINS)

Welsh Government (including Cadw) *

LOCAL AUTHORITY REPRESENTATIVE BODIES (6)

Association of Local Government Ecologists

North Wales Development Managers Group

One Voice Wales *

Planning Officers' Society (POS) [England]

Planning Officers' Society Wales (POSW)

POSW North Wales *

POSW South-East Wales

POSW South-West Wales *

Welsh Local Government Association

LOCAL AUTHORITIES (18)

Blaenau Gwent CBC

Bridgend CBC

Caerphilly CBC

Cardiff Council

Carmarthenshire CC

Ceredigion CC

Denbighshire CC

Flintshire CC

Gwynedd CC

Merthyr Tydfil CBC

Monmouthshire CC
Neath Port Talbot CBC
Newport City Council
Pembrokeshire CC
Rhondda Cynon Taf CBC
Swansea Council
Torfaen CBC
Ynys Mon CC

NATIONAL PARK AUTHORITIES (2)

National Parks Wales
Pembrokeshire Coast National Park Authority

COMMUNITY AND TOWN COUNCILS (21)

Arddleen Community Council
Barry Town Council
Bay of Colwyn Town Council
Caersws Community Council
Carreghofa Community Council
Churchstoke Community Council
Cynwyl Elfed Community Council
Holywell Town Council
Lladydilio Community Council
Llandrinio Community Council
Llanfair Dyffryn Clwyd Community Council
Llantwit Major Town Council
Monmouth Town Council
Newtown and Llanllwchaiarn Town Council
Pembrey and Burry Port Town Council
Pestrowed Community Council
Pontarddulais Town Council
Pontypridd Town Council
Presteigne & Norton Town Council
Welsh St Donats Community Council
Welshpool Town Council

OTHER PUBLIC BODIES (6)

Health & Safety Executive
Natural Resources Wales
Public Service Ombudsman for Wales
South Wales Police
Welsh Assembly
Welsh Language Commissioner

PROFESSIONAL BODIES (15)

Bar Council
British Architectural Trust
Chartered Institute of Architectural Technologists
Chartered Institute of Building
Institute of Chartered Engineers (ICE) Wales Cymru
Institute of Historic Buildings Conservation (IHBC)
IHBC (Wales Branch)
Law Society Planning and Environment Committee
Lawyers in Local Government
National Association of Planning Enforcement (NAPE)
Planning and Environment Bar Association (PEBA)
Royal Institution of Chartered Surveyors (RICS)
Royal Society of Architects in Wales
Royal Town Planning Institute (RTPI Cymru)
UK Environmental Law Association (UKELA)

LAWYERS, PLANNING CONSULTANTS, ARCHITECTS ETC (7)

39 Essex Chambers *
Doug Hughes Associates
Francis Taylor Building *
Ove Arup
Planning Aid Wales
Sirius Planning
Welsh Planning Consultants' Forum *

HOUSING BODIES (4)

Barratt & David Wilson Homes South Wales
Community Housing Cymru
Home Builders Federation
Redrow Homes (South Wales)
Residential Landlords' Association *

RURAL LANDOWNERS (9)

Canal & River Trust
The Central Association of Agricultural Valuers
Community Land Advisory Service
Country Land & Business Association (CLA)
Farmers Union of Wales
Friends of the Earth Cymru
The National Trust
Open Spaces Society
Royal Society for the Protection of Birds (RSPB)

OTHER LANDOWNERS, DEVELOPERS ETC (7)

Accessible Retail
Arqiva
Innogy Renewables UK
Mineral Products Association
National Grid
Southern Power Energy Networks
Tidal Lagoon Power

HERITAGE BODIES (20)

Aberystwyth & District Civic Society
Ancient Monuments Society
Chartered Institute for Archaeologists
Council for British Archaeology
Design Commission for Wales
Dyfed Archaeological Trust
Glamorgan-Gwent Archaeological Trust

Gwynedd Archaeological Planning Service
Gwynedd Archaeological Trust
Historic Environment Group *
Historic Houses Association
Joint Committee of National Amenity Societies *
Llandaff Conservation Area Advisory Group
Manchester Civic Society
Mid and West Wales Conservation Officers' Group
Royal Commission on Ancient and Historical Monuments in Wales
Save Britain's Heritage
Society for the Protection of Ancient Buildings (SPAB)
Society of Antiquaries
South Wales Conservation Group
Theatres Trust
Wales Heritage Group

TREE-RELATED ORGANISATIONS (8)

Ancient Trees Forum
Arboricultural Association
Cedarwood Tree Care Ltd
Institute of Chartered Foresters
London Tree Officers Association
Simon Pryce Arboriculture
Woodland Trust
Wrexham County Council (arboricultural section)

FAITH GROUPS (5)

Churches Legislation Advisory Service
Church Buildings Council (Church of England)
Cytun (Churches Together in Wales)
Diocese of Llandaff
Monmouthshire Diocesan Advisory Committee for the Care of Churches

OTHER ORGANISATIONS (2)

Radio Society of Great Britain
CMet Residents Action Group

INDIVIDUALS (36)

Mr John Almond

Mr Allan Archer, independent planning adviser

Mr Chris Bell, of Donald Insall Associates

Mr Simon Bradley

Mr Andrew Bramwell

Mr Keith Bush, QC (Hon)

Sir Richard Buxton

Dr Martin Cherry

Ms Molly Edwards

Mr Huw Evans

Mr Eric Franklin

Mr Martin Goodall, of Keystone Law

Mr Andrew Goodyear, independent planning adviser

Mr Steven Hansberger

Mr Richard Harwood QC

Mr Nigel Hewitson, of Brook Street des Roches

Ms Jessica Holland, of Donald Insall Associates

Ms Lydia Inglis, architectural historian

Sir Donsall Insall [112], architect and planner

Ms Caroline James, of CJ Consulting

Mr Philip Jenkins

Mr Edward Lewis, of Donald Insall Associates

Mr Neil McKay

Mr Mark Mackworth-Praed, of David Archer Associates

Mr Julian Morris

Mr Andrew Muir, of Boyer Planning

Mr Matt Osmont, of Donald Insall Associates

Ms Pippa Richardson

Ms Ruth Richardson

Ms Sarah Richardson

Mr Gethin Roberts, of Donald Insall Associates

Mr Mark Teale

Mr Peter Thomas

Mr Michael Tree

Mr Jordan Whittaker (small business)

Mr Elfed Williams, of ERW Consulting

Mr Huw Williams, of Geldards

Mr Owain Wyn, town planner