

HISTORIC ENVIRONMENT (WALES) ACT 2023

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5 — Supplementary provision about buildings of special interest and conservation areas

633. **Part 5** contains supplementary provision relating to Part 3 (buildings of special architectural or historic interest) and Part 4 (conservation areas). Chapter 1 contains various provisions relating to the exercise of functions by planning and other local authorities. Chapter 2 concerns proceedings before the Welsh Ministers. Sections 172 to 175 make procedural provisions applying to appeals and other proceedings before the Welsh Ministers, sections 176 to 179 concern local inquiries and sections 180 to 181 relate to costs of proceedings. The sections in Chapter 3 deal with the validity of decisions and orders relating to listed buildings and conservation areas (section 182), provide for statutory review of orders and decisions by the High Court (sections 183 and 184) and permit the correction of decisions of the Welsh Ministers under certain circumstances (sections 185 to 187). Chapter 4 groups together several provisions relating to the Crown and provides a definition of “local authority” for this Part.

Chapter 1 — Exercise of functions by planning authorities and other local authorities

Section 167 — Fees and charges for exercising functions

634. **Section 167** allows the Welsh Ministers to make regulations to require the payment of a fee or charge to a planning authority for performing any of its functions, or anything connected with those functions, under Parts 3, 4, 5 or 7 of the Act. Subsection (2) contains a non-exhaustive list of the matters that may be covered by any regulations, for example, how the amount which may be charged is to be calculated, who is liable to pay a fee and when the fee is payable.
635. Subsection (3) provides that, where the regulations allow for a planning authority to calculate the amount of the fees or charges, the income that the planning authority collects from those charges must not be higher than the cost of performing the functions.

Section 168 — Arrangements for exercising functions in relation to applications

636. **Section 168(1)** applies sections 319ZA to 319ZD of the 1990 Planning Act to the exercise of a planning authority’s functions in relation to applications for listed building or conservation area consent, variation of a consent or approval of details as required as part of a condition of a consent. Sections 319ZA to 319ZD make provision for planning authorities’ functions to be discharged by committees, subcommittees or officers, and set the requirements for the size and composition of the committees.
637. Subsection (2) prevents challenges to decisions on the grounds that they should have been made by another planning authority.

Section 169 — Arrangements for obtaining specialist advice

638. **Section 169** enables the Welsh Ministers to direct a planning authority to submit for their approval the arrangements that the authority has in place for obtaining specialist advice in connection with some of its functions under the Act. The relevant functions are set out in subsection (6) and are those where an understanding of the significance and special architectural or historic interest of a building is required in order for the planning authority to undertake its functions effectively.
639. For example, when considering an application for listed building consent, a planning authority has a duty to have special regard to the desirability of preserving the listed building, its setting and any features of special architectural or historic interest the building possesses (section 96(2)). Due to the specialist nature of works to a listed building, the availability of specialist advice is essential when determining listed building consent applications.
640. **Section 169(3)** provides that if the Welsh Ministers are not satisfied with the arrangements that one planning authority (authority A) proposes to make to receive specialist advice, they can direct another planning authority (authority B) to exercise any of the relevant functions of authority A, or to make an officer from authority B available to provide specialist advice to authority A.

Section 171 — Contributions towards expenditure by local authorities

641. **Section 171** provides that any local authority or statutory undertaker may contribute towards expenditure incurred by a planning authority or other local authority in, or in connection with, the exercise of certain functions under Part 3 (including functions when that Part is applied to a conservation area by section 163). Such a power is likely to be exercised when a planning authority's exercise of a function benefits another authority or statutory undertaker, who could contribute to the costs incurred in recognition of that fact.
642. Subsection (3) gives the Welsh Ministers a power to make or require a contribution to the cost of compensation payable by a planning authority or other local authority, in consequence of anything done under Chapters 1 to 4 of Part 3 — including anything done under Chapters 2 and 4 as applied to conservation areas by section 163.
643. In the first instance, the Welsh Ministers may contribute to the cost of compensation if the compensation arises as a result of something done wholly or partly in the interest of a service provided by the Welsh Ministers. The Welsh Ministers may also require another local authority to make a reasonable contribution towards a compensation payment if that authority has benefitted from the action that gave rise to the compensation.
644. Subsections (4) to (6) provide for compensation on the termination of a listed building partnership agreement or a provision of such an agreement. While more than one planning authority may be party to an agreement, any compensation will be paid by the authority that makes the termination order under section 115. The Welsh Ministers may, however, direct any of the other authorities party to such an agreement to reimburse the authority that paid the compensation, in whole or in part. The Welsh Ministers may only make such a direction after consulting with all of the planning authorities that are or were parties to the agreement.

Chapter 2 — Proceedings before the Welsh Ministers

Section 173 — Determination of appeal by appointed person

Schedule 12 — Determination of appeal by appointed person or the Welsh Ministers

645. [Section 173](#) provides that appeals of a type specified in subsection (2) are to be determined by a person appointed by the Welsh Ministers, instead of by the Welsh Ministers themselves. Ordinarily, the appointed person will be an inspector of Planning and Environment Decisions Wales.
646. Regulations may be made under section 173(3)(a) which would require the Welsh Ministers to determine certain categories of appeals instead of an appointed person, for example those for Grade I listed buildings. Case-specific directions can also be made under section 173(3)(b) which would recover a specific appeal to be determined by the Welsh Ministers. Comparable powers provided by the 1990 Listed Buildings Act have rarely been used, and usually only if the appeal is of national interest where the result may lead to a substantive change in policy.
647. [Schedule 12](#) makes additional provisions about the powers and duties of the appointed person and the administration of directions under section 173(3)(b).
648. [Paragraph 2](#) of the Schedule provides that an appointed person has the same powers and duties in relation to an appeal under section 100 (appeal against planning authority decision or failure to make decision) or 127 (appeal against an enforcement notice) as the Welsh Ministers have where they determine such appeals themselves.
649. [Paragraph 3](#) concerns the arrangements that an appointed person may make to conduct an appeal. Subparagraph (1) permits the appointed person to hold a local inquiry or hearing in connection with an appeal where such proceedings are allowed by a determination under section 174. Under subparagraph (2) an appointed person may appoint an assessor to advise on matters arising at a local inquiry or hearing or in written representations associated with an appeal. Since both section 100 and section 127 allow an appeal on the ground that the building is not of special architectural or historic interest, an appointed person might, for example, find it helpful to call on an assessor with particular knowledge of a class of buildings or the history of the area for specialist advice on matters arising in connection with the appeal.
650. [Paragraph 4](#) makes provision for the Welsh Ministers to revoke an appointed person's appointment at any point before an appeal is determined, and appoint another person to undertake the appeal. In these circumstances, the appeal must start afresh, but the Welsh Ministers do not need to give a person an opportunity to make fresh representations, or to modify or withdraw representations.
651. [Paragraph 5](#) provides the procedure to be followed should the Welsh Ministers issue a case-specific direction under 173(3)(b) that an appeal is to be determined by them rather than by an appointed person. [Paragraph 6](#) further provides that the Welsh Ministers may revoke such a direction at any point before an appeal is determined and appoint a person to determine the appeal.
652. [Paragraph 7](#) contains supplementary provisions. [Paragraph 7\(1\)](#) establishes that the appellant or planning authority cannot make application to the High Court under sections 183 or 184 that the Welsh Ministers should have determined the appeal unless they challenged the appointed person's power to determine the appeal before any decision was made.
653. [Paragraph 7\(2\)](#) provides that, where the Welsh Ministers appoint a member of staff of the Welsh Government to carry out their functions in relation to an appeal, those functions are to be treated as functions of the Welsh Government for the purposes of the [Public Services Ombudsman \(Wales\) Act 2019 \(anaw 3\)](#). This will enable the Public

Services Ombudsman for Wales to investigate any allegations of maladministration made in relation to the appointed person's discharge of those functions.

Section 174 — Choice of inquiry, hearing or written procedure

654. **Section 174** requires the Welsh Ministers to determine, in each case, the procedure to follow in considering the proceedings set out in subsection (7). The procedure can be a local inquiry, a hearing, written representations or any combination of those three. The choice of procedure will largely be determined by the extent to which evidence needs to be tested through oral examination. Written representations are suitable when the issues raised can be clearly understood from the submitted documents and a site inspection. A hearing will be scheduled where evidence needs to be tested through questioning but there is no need for cross-examination or for evidence to be given on oath. An inquiry is likely to be necessary where the issues are complex and the evidence needs forensic examination through cross-examination. It is possible that some issues in cases will be considered on the basis of written submissions while others will be examined in a hearing or inquiry.
655. The Welsh Ministers must determine the procedure within a period prescribed in regulations, but may vary that determination with a further determination at any time before the proceedings conclude. The Welsh Ministers must notify the appellant or applicant (as appropriate, depending on the nature of the proceedings) and the planning authority of the procedure that has been selected and publish the criteria that are to be applied in determining the procedure to be followed.

Section 175 — Procedural requirements

656. **Section 175** allows the Welsh Ministers to make regulations setting out the procedures to be followed in connection with any appeal, application or reference that is to be considered by the Welsh Ministers under Part 3 and Part 4 of the Act (whether by local inquiry, hearing or written representations). The regulations may also make provision for the procedure to be followed for any other local inquiry or hearing held by or on behalf of Welsh Ministers under Parts 3 or 4 or this Part of the Act. For example, the regulations may, therefore, set procedures for hearings or inquiries that are held before the Welsh Ministers to confirm an order modifying or revoking listed building consent (see Schedule 8). The Welsh Government has published the *Procedural Guide — Wales* (2017), for appeals including listed building and conservation area consent appeals, listed building and conservation area enforcement notice appeals and listed building or conservation area consent call-ins. It is available on the “Planning appeals guidance” page of the Welsh Government website.

Section 176 — Power of Welsh Ministers to hold local inquiry

Section 177 — Power of person holding inquiry to require evidence

657. **Section 176** allows the Welsh Ministers to cause a local inquiry to be held for the purpose of exercising any of their functions in Parts 3 and 4 of the Act, or under this Part. **Section 177** allows the person holding an inquiry to summon any person to attend an inquiry to give evidence or to produce any documents that relate to the inquiry.
658. **Section 177(5) to (7)** establishes offences relating to a failure to comply with a summons to an inquiry.
659. A person guilty of an offence on summary conviction is liable to a fine not exceeding level 3 on the standard scale or a term of imprisonment not exceeding the maximum term for summary offences, or both (subsection (6)).

Section 178 — Access to evidence at inquiry

Section 179 — Payment of appointed representative where access to evidence restricted

660. At a local inquiry held under this Part, section 178 requires all oral evidence to be heard in public and all documentary evidence to be available for public inspection. However, where the Welsh Ministers or the Secretary of State consider that public disclosure would be likely to reveal information about national security or the security of any premises or property and would be against the national interest, subsection (2) provides that the Welsh Ministers or the Secretary of State may direct that oral evidence be heard and documents be inspected by specific people only.
661. If such a direction is being considered, the Counsel General, the Welsh Government’s law officer and chief legal advisor, may appoint a person (an “appointed representative”) to represent the interests of those people who would be prevented from hearing or inspecting the evidence.
662. **Section 179** provides for the payment of the appointed representative whether or not an inquiry takes place. The Welsh Ministers or the Secretary of State may direct a “responsible person” with a national security or other interest in the inquiry to pay the appointed representative’s expenses. If, for instance, a local inquiry were held in connection with an appeal relating to a listed building on an active military base in Wales, there could easily be reasons for limiting access to information in the interest of national security. In such a case, the Welsh Ministers or the Secretary of State might direct the Ministry of Defence, as the responsible person, to pay the costs of the appointed representative.

Section 180 — Payment of costs of Welsh Ministers

663. **Section 180** allows the Welsh Ministers to recover the costs they incur in proceedings on any application, appeal or reference made to the Welsh Ministers under Part 3 or Part 4 whether matters proceed by way of written representations, a hearing or inquiry. They may also recover the costs they incur where a local inquiry or hearing is held for the purpose of making any other kind of decision under Parts 3 and 4 or this Part, for example prior to confirming a purchase notice or making an order modifying or revoking listed building consent.
664. **Section 180** allows the Welsh Ministers to recover the entire administrative costs they incur, including general staff costs and overheads. It also allows the Welsh Ministers to make regulations prescribing a standard daily amount for specified proceedings.

Section 181 — Orders relating to costs of parties

665. **Section 181** allows the Welsh Ministers to order one party to pay another party’s costs, which may include costs in respect of an inquiry or hearing that does not take place.
666. Costs will only be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense.
667. Guidance on the award of costs is contained in the Welsh Government’s *Development Management Manual Section 12 Annex: Award of Costs* (2016).

Chapter 3 — Validity and correction of decisions

Section 182 — Validity of certain decisions and orders relating to buildings

Section 183 — Application to High Court for statutory review of decision or order

668. **Section 182** provides that certain decisions and orders may only be challenged by statutory review under the procedure set out in section 183, and may not be challenged by means of any other legal proceedings. The decisions in question are set out in subsection (2) and the orders in subsection (3).
669. **Section 183** provides that a person who is aggrieved by a decision or order listed in section 182(2) or (3) may make an application to the High Court for the statutory review of the decision or order. Depending on the circumstances of the individual case, aggrieved persons may include the owner or occupier, the applicant or appellant, or some other party who made objections or representations as part of the procedure which preceded the decision or order challenged. The authority directly concerned with the decision or order, as defined in subsection (7), may also make an application for statutory review.
670. An application for statutory review may only be made with the permission of the High Court. A relevant decision/order may be challenged on the grounds that:
- a. it is not within the appropriate powers; or
 - b. there has been a failure to comply with a procedural requirement and the applicant has been substantially prejudiced by that failure.
671. A decision may be found to be outside the appropriate powers not only by reference to the powers and requirements set out in the Act, but also, for example, because the decision-maker has acted irrationally, or taken into account irrelevant, or failed to take into account relevant, considerations.
672. Such a challenge is not an opportunity to review the merits of the decision or order challenged.

Section 184 — Appeal to High Court against decision relating to enforcement notice

673. **Section 184** requires rules of court to provide a mechanism for interested persons (see subsection (2)(b)) to challenge decisions made by the Welsh Ministers on appeals relating to enforcement notices. The rules must determine whether interested persons may appeal to the High Court (in practice, the appeals would be dealt with by the Planning Court, a specialist court within the High Court, and the rules are contained in Part 54 of the Civil Procedure Rules and Practice Direction 54D, which are made by the Civil Procedure Rule Committee), or whether the Welsh Ministers may be required to state and sign a case for the opinion of the High Court (which, in practice, would require the Welsh Ministers to ask the Planning Court for its judgment on whether they decided the appeal properly, and the rules are contained in Practice Direction 52E).
674. **Section 184** does not apply to challenges to enforcement appeal decisions under section 128(3)(a) or (b) (granting consent or removing conditions of consents). These decisions can only be challenged under section 183 (statutory review).
675. Subsection (8) provides that an appeal to the High Court under this section may only be brought with the permission of the High Court. If the Court does not consider that there is a strong case, it can refuse permission (and appeal applications under this section may only be made on points of law, and not merely because a person disagrees with a decision). Practice Direction 54D currently provides that an application for permission must be made within 28 days of the decision being challenged, although the High Court can extend this period if it considers there is good reason to do so.

676. Practice Direction 54D also provides that, where the Court determines that the original decision is erroneous on a point of law, the Court cannot set the decision aside and can only require the Welsh Ministers or appointed person to reconsider the case.

Section 185 — Meaning of “decision document” and “correctable error”

Section 186 — Power to correct correctable errors in decision documents

Section 187 — Effect and validity of correction notice

677. Sections 185 to 187 provide that the Welsh Ministers may correct certain errors contained in particular decision documents. These three sections define key terms, set out the power to correct errors, and explain the effect of a decision whether or not to correct an error.
678. Section 185 provides that the correction power is exercisable in relation to “decision documents” that record:
- a. decisions of a type listed in section 182(2);
 - b. decisions on appeals against enforcement notices under section 127; and
 - c. any other types of decisions specified in regulations made by the Welsh Ministers.
679. The section also sets out that the correction power may only be exercised in relation to errors, which include omissions, that are not part of any reasons given for the decision.
680. Section 186 sets out the procedure the Welsh Ministers must follow to correct errors in a relevant decision document.
681. Subsection (2) sets out that the procedure starts where, before the end of the “review period”, the Welsh Ministers receive a request in writing to correct an error or, on their own initiative, write to the applicant to explain that the decision document contains a mistake that the Welsh Ministers are considering correcting. The “review period” is defined in subsection (4) by reference to the period for bringing proceedings under section 183 or 184 (set out in the relevant Civil Procedure Rules and practice directions). It is 6 weeks in relation to decision documents recording decisions of a type listed in section 182(2) and 4 weeks in relation to decision documents recording decisions on appeals against enforcement notices under section 127 (other than decisions to which section 182 applies). The planning authority must also be informed that a request to make a correction has been received, or that the Welsh Ministers are considering making a correction.
682. Subsections (5) and (6) provide that the Welsh Ministers must, as soon as practicable after correcting an error or deciding not to correct an error, issue a correction notice which will either specify the correction that has been made or give notice that they are not correcting the error. Subsection (7) specifies on whom the correction notice must be served. Subsection (8) provides that the functions under this section may be exercised by an appointed person if an appointed person made the original decision.
683. Section 187 sets out the status of corrected and uncorrected decisions.
684. A corrected decision will be treated as having been made on the date the relevant correction is made and the statutory period for challenging the corrected decision will start to run from that date. Any person wishing to challenge the decision is therefore not prejudiced by the time taken to correct the decision. If the Welsh Ministers do not correct a decision, the original decision will stand and the statutory period for challenge will be unaffected.