

Intervention by planning authorities

ACTION BY PLANNING AUTHORITY WHERE UNAUTHORISED WORKS ARE UNDERTAKEN

- 3.1 Where a planning authority becomes aware that works have been undertaken to a listed building without consent, or that conditions imposed upon a consent granted have not been complied with, it may refer the case to the procurator fiscal with a view to prosecution and/or issue a listed building enforcement notice requiring rectification of the damage done.
- 3.2 In considering whether to proceed by seeking prosecution or by issuing an enforcement notice, planning authorities will wish to consider the feasibility of achieving major improvements by means of an enforcement notice.

section 6, 8 and 34 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

In most cases of unauthorised alterations or extensions an enforcement notice issued locally is probably the best way to achieve a practical improvement in the building's condition. Scottish Ministers believe that prosecution for unauthorised works is best confined to cases where the works done are so radical that improvement is hardly feasible.

If a listed building upon which unauthorised works have been carried out is a scheduled monument, the matter should be reported immediately to Historic Scotland to take appropriate action. In such cases the planning authority has no locus to issue a listed building enforcement notice.

LISTED BUILDING ENFORCEMENT NOTICES

- 3.3 Listed building enforcement notices are served on the owner, lessee and occupier of a building to which unauthorised works have been carried out and on any other party with an interest in the building. Notices must be served on the current owner, lessee and occupier, even if the property has changed hands since the unauthorised works were carried out.

Notices, which must be served in writing, must specify the alleged contravention and one of the following sets of steps:

- a the steps required to restore the building to its former state

sections 34 and 35 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

b the steps required to alleviate the effects of work executed without listed building consent

c the steps required to bring the building to the state it would have been in if the terms and conditions of any listed building consent for works had been complied with

An enforcement notice must also specify the period within which the steps required are to be taken.

- 3.4 A notice requiring the alleviation of works executed can only be issued if the planning authority is content that complete restoration is either impracticable or undesirable.

*section 34(2) and (3)
Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997*

There are occasions when the appearance of a building can be improved where the planning authority is able to require something less than complete reinstatement: it may, for example, be undesirable to require the reinstatement of outbuildings or later additions to the building which are not in keeping with the original structure.

Planning authorities should note, however, that the steps specified in the notice must be limited to steps required to minimise the effect of unauthorised works, or works required to restore a building to its original condition prior to the unauthorised works being carried out. An enforcement notice cannot seek to achieve improvements unrelated to works carried out without consent.

*section 34(2) and (3)
Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997*

Listed building consent is deemed to be granted to works of alleviation as specified in an enforcement notice.

section 34(4) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.5 A planning authority may withdraw a listed building enforcement notice at any time before it takes effect. Notification of withdrawal must immediately be given to every person on whom the notice was served. Withdrawal of a particular notice does not prejudice the planning authority's right to serve a different one.

section 34(7) and (8) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.6 Every planning authority has to keep available for public inspection free of charge, at reasonable hours and at a convenient place, a list containing particulars of any buildings in their district in respect of which a listed building enforcement notice has been served.

section 34(9) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.7 Failure on the part of the person responsible for the contravention, who may not be the person on whom the notice was served, to comply with the terms of a listed building enforcement notice within the time specified constitutes an offence leading on summary conviction to a fine of £20,000, or on conviction on indictment to an unlimited fine.

section 39 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.8 The planning authority is also empowered, if the steps required by a listed building enforcement notice have not been taken within the time allowed, to enter on to the land and take those steps and to recover from the person who is then the owner or lessee of the land,

section 38 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

but who may not have been the owner at the time when the contravention was committed, any expenses reasonably incurred in doing so.

Such expenses are deemed to have been incurred on behalf of the offending party, as are expenses incurred directly by the current owner to comply with the enforcement notice, making it possible for a claim at common law for reimbursement to be lodged against the individual who carried out the unauthorised works.

OFFENCES IN RESPECT OF UNAUTHORISED WORKS

- 3.9 It is an offence to execute or cause to be executed any unauthorised works either for the demolition of a listed building or for its alteration or extension in a way which would affect its character. Failure to comply with the terms of a conditional grant of listed building consent is also an offence.

sections 6 and 8 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

In both cases, an offender found guilty is liable on summary conviction to imprisonment for a term not exceeding 6 months and/or a fine not exceeding the statutory maximum (currently £20,000), or on conviction on indictment to imprisonment for a term not exceeding 24 months and/or an unlimited fine.

In the latter case, the Court in deciding the amount of the fine is directed to take into consideration any financial benefit which has accrued or is likely to accrue to the offender as a result of their action.

- 3.10 It can be a defence against the offences mentioned above to prove that works to the building were urgently necessary in the interests of safety or health or for the preservation of the building, that it was not practical to proceed by works of repair or works providing temporary support and shelter and that the works carried out were limited to the minimum measures immediately necessary.

section 8(3) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

The defence is also dependent on notice in writing justifying in detail the carrying out of the works being given to the planning authority as soon as reasonably practicable.

However, demolition works may be undertaken as a last resort only and that to claim the defence a person needs to be able to prove that repair or temporary shelter works were not practicable (see 3.12-3.16).

- 3.11 Any person who damages, or allows damage to be done to, a listed building is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1000).

section 53 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

If thereafter such a person fails to take reasonable steps to prevent damage, or additional damage, resulting from the first offence, they are guilty of a further offence and liable on summary conviction to a fine not exceeding £40 for each day on which this failure continues.

DANGEROUS BUILDINGS

- 3.12 Building control authorities may serve a notice requiring the owners of a building, including a listed building, to execute works to make safe or to demolish the building because of its dangerous state or other major defect.

sections 10, 11, 13 and 17 Building (Scotland) Act 1959

These powers have effect only insofar as they are consistent with the provisions for work to listed buildings, and unlisted buildings in conservation areas, contained in the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. The existence of an order does not relieve the owner of a property in respect of which such a notice has been served of their normal obligations to obtain listed building consent or conservation area consent for the works which the notice requires.

If a listed building upon whose owner a dangerous buildings notice has been served is also a scheduled monument, the owner must obtain scheduled monument consent from Scottish Ministers before undertaking any works to the building.

However, works which are urgently necessary in the interests of health or safety are permitted, provided that (a) the works are limited to the minimum measures immediately necessary, and (b) notice in writing justifying in detail the need for the works is given to Scottish Ministers as soon as practicable. In any such case, the owner is advised to make contact with Historic Scotland at the earliest opportunity.

Class 5 of Schedule, Ancient Monuments (Class Consents) (Scotland) Order 1996 (SI 1996/1507)

- 3.13 It is clearly very important that building control and planning departments liaise closely when service of a notice requiring works to a listed building is under consideration.

Where a local authority serves a notice, makes an order or proposes to take action under any enactment requiring either the demolition of, or works to, a listed building it owns, leases or occupies, or which affects such a building, it shall immediately give written notice of the fact to Scottish Ministers.

section 56 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Where the safety of the public requires that the works be carried out without delay, notice, which in such cases may initially be oral, will be given as soon as possible before the works commence. This latter provision seeks to ensure that the earliest possible warning of threats to such listed buildings and that wherever possible listed building consent is sought and obtained for emergency works to make safe or to demolish the listed building.

- 3.14 Scottish Ministers hope that in all cases where the need for demolition of a listed building, or a building in a conservation area, is not immediate, planning authorities will consider whether it might not be preferable instead to issue a repairs notice (see 3.30).

To avoid the service of unnecessary notices, it is strongly suggested that building control departments contact planning departments in advance of formal service of a notice wherever possible so that discussions can take place about the best way of safeguarding both public health and safety and, wherever possible, the listed building itself.

Occasionally it will be necessary to carry out emergency demolition works at very short notice, particularly where fire, flood or other natural disaster has radically altered the condition of a building over a very short space of time.

In most cases, however, buildings become dangerous very gradually and Scottish Ministers are concerned that on a number of occasions listed buildings are being demolished after a long period of neglect during which exercise of the repair powers available to planning authorities (see 3.18-3.20) would have preserved them. In Scottish Ministers' view, the powers available to planning authorities are adequate to ensure that listed buildings do not normally deteriorate to the stage where demolition is inevitable and it is their duty to use these powers should the need arise.

- 3.15 Where emergency demolition does have to be undertaken, the need to obtain listed building consent is not abrogated but the defence of urgent necessity can be claimed if consent had not been obtained and proceedings for unauthorised works are initiated.

section 8(3) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

It is necessary not only to prove that works to the building were urgently necessary, but that it was not practicable to preserve the building by works of repair, or works of temporary support or shelter, and that the works carried out were limited to the minimum measures immediately necessary.

Given this restriction, building control authorities should be careful in their notices to specify only such demolitions and/or repair works as are immediately necessary to prevent danger. It is possible for building authorities to specify demolition or alteration of particularly dangerous parts of a structure only, for example, leaning parapets or pinnacles etc.

Buildings (Scotland) Act 1959

The onus of proof will be on individuals who demolish their property, whether or not it was subject to a notice under the Building Acts, to show not only that works were urgently necessary but that no lesser solution than demolition was feasible. Individuals must also give notice in writing justifying in detail the carrying out of the works to the planning authority as soon as possible.

section 8(3)(d) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.16 Scottish Ministers are concerned to avoid the unnecessary demolition of listed buildings and worthwhile buildings in conservation areas wherever possible, and hopes that planning authorities will make full use of the repair and compulsory purchase order powers outlined below.

In cases where the building control authority believes that it may have to carry out demolition works itself, it should notify both the planning authority and the Historic Buildings Inspectorate at the earliest possible opportunity, and certainly before any works are undertaken on site to permit consideration of alternative measures. Building control authorities are reminded that where work must be carried out they should only proceed with demolition to the point where the building is made safe.

REPAIR AND MAINTENANCE OF HISTORIC BUILDINGS

- 3.17 The preservation of historic buildings requires their regular maintenance and timely repair. Expenditure on routine maintenance and repairs can avoid the need for more expensive work caused by their neglect.

While there is no specific obligation on the owner of a listed building to maintain it, there are statutory powers available to planning authorities and Scottish Ministers to take action where listed buildings have deteriorated. These powers allow them to carry out urgent works for the preservation of listed buildings, to serve 'repairs notices' and to compulsorily acquire listed buildings in need of repair.

URGENT WORKS FOR THE PRESERVATION OF LISTED BUILDINGS

- 3.18 The planning authority or Scottish Ministers may carry out emergency works for the preservation of listed buildings in their area. Such works may consist of or include works for affording temporary support or shelter to the building, for example, planning authorities may erect supporting scaffolding or put in place a temporary roof covering.

section 49 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

If the listed building is partly occupied works may be carried out only to those parts which are not in use. Scottish Ministers may direct that an unlisted building in a conservation area should come within the scope of these powers.

No action may, however, be taken under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 in respect of ecclesiastical buildings in use as such, subject to future limitations of the exemption by order (see 2.4), and scheduled monuments. The owner of the building must be given not less than 7 days' notice in writing of the intention to carry out the works and the notice must describe the works which the planning authority proposes to carry out.

sections 54 and 55 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.19 The planning authority or Scottish Ministers may require the owner of the building to pay the expenses of the works undertaken. Such

section 50 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

expenses may include continuing expenses involved in making available such necessary apparatus as scaffolding, and the owner may be notified from time to time of the cumulative total of such continuing expenses.

Within 28 days of receipt of a notice requiring payment, the owner may represent to Scottish Ministers that some or all of the works were unnecessary for the preservation of the building, that the amount claimed is unreasonable, that recovery of the cost would cause hardship, or that temporary arrangements for support of the building have continued for an unreasonable length of time.

- 3.20 Planning authorities are encouraged to use these powers not only at the point where deterioration is so far advanced that without emergency intervention irretrievable loss is inevitable, but preferably at earlier stages when relatively inexpensive works can halt a building's deterioration and greatly improve its chances of economic re-use.

sections 54 and 55 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Planning authorities will also wish to take into account the power (see 3.18) to undertake works of temporary support on a continuing basis. The erection of supportive scaffolding or temporary measures to prevent water penetration can often afford a useful breathing space in which the future of the building can be properly considered.

- 3.21 Authorities should, however, take care to ensure that any work done on a building is the minimum required for its preservation and is carried out at a reasonable cost. Expensive permanent repairs should not be undertaken using these powers.

section 49 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Works undertaken should normally be those designed to keep a building wind and weatherproof, to provide necessary structural support in cases of potential danger or to prevent damage by vandals.

COMPULSORY ACQUISITION OF LISTED BUILDINGS IN NEED OF REPAIR

- 3.22 Planning authorities and Scottish Ministers are empowered to acquire compulsorily listed buildings which are not being properly conserved. Compulsory purchase proceedings can only be initiated following service of a repairs notice (see 3.30). Ecclesiastical buildings in use as such, subject to variation of the current exemption by order, and scheduled ancient monuments are exempt from compulsory acquisition under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997. This section does not apply to unlisted buildings in conservation areas, or to Crown property.

sections 42, 43, 54 and 55 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

The procedure for compulsory purchase is set out in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947: the forms to be used are prescribed in the Compulsory Purchase of Land (Scotland) Regulations 1976 (SI 1976/820).

Planning authorities may wish to note that certain additional paragraphs are required to be included in the form of notice sent out to interested parties where a listed building is the subject of the order. A compulsory purchase order made by a planning authority requires Scottish Ministers' confirmation in the usual way.

Regulation 4 Compulsory Purchase of Land (Scotland) Regulations 1976 (SI 1976/820)

- 3.23 The compulsory purchase order may include, besides the building, any neighbouring land required for preserving the building or its amenities, or for giving access to it for its proper control or management.

section 43(7) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.24 Anyone having an interest in a building on which a compulsory purchase order has been made under this section may apply to the sheriff within 28 days after the service of the CPO notice for an order prohibiting further proceedings on it. If the sheriff is satisfied that reasonable steps have been taken to preserve the building an order prohibiting further proceedings may be made. There is a right of appeal against the sheriff's decision to the Court of Session, but on a point of law only.

section 42(5) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.25 Before confirming a compulsory purchase order, Scottish Ministers must be satisfied that the building ought to be preserved and that it should be compulsorily acquired for that purpose. Scottish Ministers must also have regard to objections to the order made in writing.

*section 42(2) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997
Compulsory Purchase of Land (Scotland) Regulations 1976 (SI 1976/820)*

Where the objection is not one which may be disregarded and is made by a statutory objector, Scottish Ministers are required to afford the objector an opportunity to appear before and to be heard at a public local inquiry or, if the objector agrees, at an informal hearing.

COMPENSATION ON COMPULSORY ACQUISITION OF LISTED BUILDINGS

- 3.26 Any person whose building is compulsorily purchased is entitled to compensation in the normal way. In assessing the compensation payable on compulsory acquisition of a listed building, it should be assumed that listed building consent would be granted for any works of alteration or extension.

section 44 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Consent to demolish cannot, however, be assumed. This exclusion avoids the possibility that an authority wishing compulsorily to acquire a listed building in order to preserve it might nonetheless have to pay a redevelopment value which could not have been realised in the open market.

If consent for works has been refused by Scottish Ministers or granted subject to conditions, then in assessing the compulsory purchase compensation it is not to be assumed that consent for such works would be granted. Again, this is to avoid double compensation in respect of the same restriction.

MINIMUM COMPENSATION

- 3.27 A planning authority which is satisfied that a listed building has been deliberately allowed to fall into disrepair in order to justify its demolition and the redevelopment of the site can, when making a compulsory purchase order, make a 'direction for minimum compensation'.

section 45 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

The effect of such a direction is that in assessing the compensation to be paid it is assumed that neither planning permission nor listed building consent would be given for any works to the building except those for restoring it to, and maintaining it in, a proper state of repair: in other words, all development value is excluded.

- 3.28 If a planning authority makes an application for a direction of this sort, it must include a statement that it has done so in the statutory notice which it is required to serve on the owner, lessee or occupier. The statement must contain an explanation of the meaning of the term 'direction for minimum compensation'.

section 45(3) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

- 3.29 If a direction for minimum compensation is made, any person with an interest in the building may, within 28 days of the service of the notice referred to in paragraph 3.28, apply to the sheriff for an order that the direction for minimum compensation be reversed.

section 45(6) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

If the sheriff is satisfied that the building has not been deliberately allowed to fall into disrepair for the purpose mentioned, the order must be made. There is a right of appeal to the Court of Session against the decision of the sheriff, but on a question of law only.

section 45(7) and (8) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

In the case of such an application it will be necessary to demonstrate that there has not been any deliberate neglect. Whether the owner applies to the sheriff or not, however, Scottish Ministers' confirmation of the compulsory purchase order is needed before the minimum compensation provision takes effect.

REPAIRS NOTICES

- 3.30 Compulsory purchase proceedings by planning authorities or Scottish Ministers cannot begin unless at least 2 months previously a 'repairs notice' has been served on the owner.

sections 42-45 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

This notice must specify the works considered reasonably necessary for the proper preservation of the building, and must point out that if the requirements of the repairs notice are not carried out, proceedings to acquire the building compulsorily may be started. Planning authorities should only serve such notices where they are firmly committed to compulsory acquisition failing satisfactory action by the owner.

- 3.31 A repairs notice may be withdrawn at any time. Planning authorities which have served a repairs notice should always follow-up the

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notice as quickly as possible, lest owners be left uncertain as to whether or not the planning authority intend to proceed to compulsory purchase.

section 45(3) Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Negotiations with an owner on a repairs notice should always be undertaken at an early date in order to secure the preservation of the building in question with the minimum of anxiety and uncertainty for the owner.

A planning authority may on occasion feel uneasy about moving to take action because of concerns that it may have difficulty in disposing of the building after acquisition. In such cases, early consultation with a building preservation trust can be obtained from:

The Secretary
The Association of Preservation Trusts
27 John Adam Street
London
WC2 6HX
telephone 0171 930 1629