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Dangerous Buildings and Demolition

1 Introduction

Listed building consent or conservation area consent is required for the demolition of any listed building or building within a conservation area. *Scottish Planning Policy* (2010), paragraph 113, notes that ‘there is a presumption against demolition or other works that will adversely affect a listed building or its setting’ and *Scottish Historic Environment Policy* (SHEP) notes, as Key Principle 1.14(b), that ‘there should be a presumption in favour of preservation of individual historic assets and also the pattern of the wider historic environment; no historic asset should be lost or radically changed without adequate consideration of its significance and of all the means available to manage and conserve it’. *Creating Places. A policy statement on architecture and place for Scotland* (2013) reinforces this when it stresses that ‘a re-use not replace approach should be considered first when dealing with our existing built environment’.

It is therefore clear that it is Scottish Government policy that no worthwhile building should be lost unless it is demonstrated beyond reasonable doubt that every effort has been made to find practical ways of keeping it. The fact that a listed building or building in a conservation area is unused is not in itself justification for unsympathetic change or demolition.

While it is possible to apply for consent to demolish a protected building, there would require to be a very convincing case to support any application. A statement of justification should be provided setting out the applicant’s case based on one or more of a number of considerations:

- That the applicant believes the building is not of sufficient interest to be listed or, in the case of an unlisted building, fails to make a positive contribution to the character of the conservation area, as backed by a statement outlining the evidence to support this assertion;
- That the applicant believes the building is incapable of repair, backed by a detailed survey highlighting the issue(s) that cannot be resolved;
- That the applicant believes that the building is capable of repair but that this is not economically viable to achieve this, supported by a detailed survey together with a priced schedule of works for the repair of the building and evidence of the value of the building once repaired. In addition, it will normally be important to show that the building has been marketed for a reasonable period, normally not less than 6 months; and
- That the applicant believes that the proposed replacement scheme offers significant community benefits as demonstrated through a statement that explains the nature of these benefits and how they cannot be realised if the building is retained.

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Before reaching a decision on an application the planning authority, in consultation with Historic Scotland, would normally consider whether all reasonable measures have been taken to ensure that the building is safe and secure from vandalism and the elements, that is not being allowed to deteriorate deliberately and that it is not possible to adapt the existing building to accommodate any new use which would safeguard its future.

All evidence in support of or used in the assessment of an application for demolition should be of the highest professional quality.

2 Defective Buildings

Councils are responsible for the duties set out in the Building (Scotland) Act 2003 to ensure that buildings comply with building regulations and associated technical standards and to make sure that public safety is maintained in relation to defective and dangerous buildings. The Act allows local authorities to take enforcement action where work is carried out without a building warrant or is contrary to building warrant requirements and to intervene where a building causes a public danger. The powers are wide ranging and can be used effectively in combination with those available under the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 in a measured approach to addressing buildings at risk cases. A number of sections of the Act are relevant:

Section 25: Building Regulation Compliance

The local authority can require that certain buildings comply with required provisions of the building regulations. These notices can be used, for example, to ensure the provision and display of Energy Performance Certificates within certain building types.

Section 26: Continuing Requirements Enforcement Notice

A continuing requirement notice may be served in respect of conditions that are required to secure the health and safety of people using or visiting a building. These can be used where the owner of the building appears to be failing to comply with the continuing requirement.

Section 27: Building Warrant Enforcement Notice

These are served on anyone who has carried out building or demolition work without a warrant or where work has been carried out that is not in accordance with the relevant building warrant.

Section 28: Defective Buildings Notice

This notice may be served on an owner of a building to rectify defects or to bring the building into a reasonable state of repair, having regard to its age, type and location. The terms 'in a reasonable state of repair' and 'taking account of the age, character and location of the buildings' are not defined. The power, which is discretionary, replaced that in section 87(1) of the Civic Government (Scotland) Act 1982. The local authority must specify in the notice the dates by which works must be started and completed and may specify particular steps which the owner must take to comply with the notice.

It might be used, for example, in the case of a leaking roof risked damaging the structure of a building, to require the owner to make it waterproof. Commonly, problems arise with the need to repair buildings in common ownership. This may result from the unwillingness of a neighbour to pay their share of costs arising from the works. In such cases a council can compel all owners with a common interest to have the necessary work carried out. If an owner has been

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served a Section 28 notice and fails to carry out the works, an occupier or tenant may, with local authority consent, arrange for this to be carried out under their direction.

If a property has been well maintained and is in a reasonable state of repair but is put at risk because of a defect in a neighbour's building, the council can use its discretionary powers to instruct the neighbour to carry out the necessary repairs. An example of this might be an outbreak of dry rot within a neighbouring property. When required, affected owners should have the work carried out themselves but if the owners fail to agree the council may serve a notice on all affected owners requiring that essential works are started within 7 days and completed within 28 days of receipt of the notice. Affected owners can object to the requirements of the notice within 21 days of it being served. If the works specified in the notice are not completed by the owners within the period stated, the council can instruct a contractor to have the works carried out on its behalf.

When the owners agree to have repairs or removal works carried out then the costs are borne by respective owners on a basis to be agreed by them. In the event that the council is required to undertake the works, all expenses incurred, including the costs of the actual work and charges for administration, tendering and contractual costs, can be recovered from recipients of the notice. Previous Buildings Acts (1959, 1970) made provision for local authorities to recover costs through a 'charging order'. This placed a burden on the building or site so that any future sale could not take place without payment to the local authority of any outstanding monies and interest accrued. However, the 2003 Act did not continue this facility and costs have to be recovered instead as a civil debt through local authority's normal debt recovery procedures. Charging orders were relatively inexpensive to record and they had a legal standing over other debts. Civil debt, on the other hand, joins a queue of all other creditors, requires the tracing of individuals (at a cost), involves court action and can be complicated in cases of multiple ownership.

When an owner fails to carry out repair works within the period specified, officers, contractors or workmen authorised by the local authority may enter the premises to carry out the works. If entry is not allowed, or not possible for any other reason, the council can may apply to the Sheriff for an entry warrant. Any person who wilfully obstructs an authorised person acting on behalf of a council in the course of inspecting a building to assess the extent of defects or to carry out works required to repair, secure or remove defects, shall be guilty of an offence and liable to be prosecution. Where right of entry has been exercised the council and its authorised representatives must leave such land or premises as effectively secured as they found them.

It is widely felt that the removal of the charging order facility restricts the ability of local authorities to recover costs from defaulting owners and limits the number of notices being served. Pressure on local authority resources prevents the use of a proactive approach using the discretionary powers and leads councils towards more informal engagement with owners. Councils can be reluctant to serve notices routinely as this could establish a precedent which cannot be sustained, particularly where it is felt the efforts involved are disproportionate to the results achieved. Serving notice is seen by some as an encouragement to owners not to undertake repairs and a reliance on the 'moral' responsibility on the local authority to resolve defects.

At the time of writing the Scottish Government is consulting on The Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill. The Bill makes provision for an Act of the Scottish Parliament to amend the Building (Scotland) Act 2003 to provide for expenses incurred by local authorities in the repair, securing or demolition of defective or dangerous

buildings to be recovered by way of a charging order. The Community Empowerment Bill, which is also being consulted on, makes other provisions for improved powers for local authorities to recover the costs of dealing with dangerous and defective buildings.

3 Dangerous Buildings

Dangerous Buildings: Section 29

Where a council is aware that a building constitutes a danger to people in or about that building, to the public generally, or to adjacent buildings or places, then it has a duty to act by carrying out the work necessary to remove that danger. Where a building constitutes an immediate danger the local authority must carry out such work (including, if necessary, demolition) as it considers necessary:

- To prevent access to the dangerous building and to any adjacent parts of any road or public place which appear to us to be dangerous by reason of the state of the building; or
- For the protection of the public and of persons or property in places adjacent to the dangerous building.

In removing the danger the council should take steps to notify the owner, if possible, of the urgency of the situation and the impending works.

Dangerous Building Notices: Section 30

Where there is a need for urgent but not immediate action the council must notify the owners by serving a notice under Section 30 of the Act to give them the opportunity to carry out the necessary work themselves. If this fails, the authority can take the necessary action and reclaim the costs and expenses from the owner. In certain instances, the nature of the danger or the emergency work required may prevent the occupiers from remaining in the building. In such situations, occupants will have to move out immediately, and the council can apply to the Sheriff for a warrant to facilitate this.

Situations arise causing the need for works to address dangerous conditions in buildings in common ownership. This can result in the unwillingness of a neighbour to pay their share of costs arising from the necessary works. In such cases the local authority can compel all owners with a common interest to have the necessary work carried out to remove the danger. If the owners fail to agree to this then the council can arrange for the works to be undertaken by a contractor appointed by them. Affected owners may object to the requirements of a notice. The appeal must be lodged with the sheriff within 21 days of the date of the notice and may be made by the owners of the affected building. As a consequence, the notice has no effect until 21 days have past or any appeal is withdrawn or determined.

The council is authorised to enter buildings for the purpose of inspecting it to assess whether a danger exists and to carry out works to address it. It is necessary to give three days' notice to the occupiers and owners (unless the owner is unknown) if entry is needed to do the works.

When owners agree to have essential repairs or removal works carried out then the costs are borne by respective owners on a basis to be agreed by them. In the event that the council is required to undertake the works, all expenses incurred, including the costs of the actual work

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and charges for administration, tendering and contractual costs can be recovered from recipients of the notice.

In extreme cases, councils are authorised to insist on the immediate removal of occupants and may apply to the Sheriff for a warrant to facilitate this. If a warrant is granted, such a decision is final and there are no rights of appeal. A person shall be guilty of an offence if they wilfully obstruct an authorised person acting for a council in the course of inspecting a building to assess the extent of danger or to carry out works required to repair, secure or remove danger from it. Any such person is liable to be prosecuted.

The protection of persons is the principal concern and alternatives to demolition or other physical intervention can be employed to secure protection. These include the erection of security barriers to prohibit access to and around the building causing the danger. The factors that typically influence the response by local authorities to a dangerous building situation have been identified as:

- The nature and severity of the dangers (such as structural decay or damage, fire damage, impact damage, loose parts of building elements or building fixtures or sudden subsidence);
- The physical proportions and nature of the building (for example, height or use);
- Geographical location (for example, city centre, rural or remote);
- The location of the danger (for example, internal affecting only the building itself or external affecting other buildings and outside public spaces);
- The ease of accessibility to do emergency work;
- The extent of the danger and whether several buildings are affected; and
- Those at risk from the danger including the general public passing by and building occupiers.¹

What is crucial, however, is the fact that a local authority response to a building danger is mandatory under either section 29 or section 30. As with the Defective Buildings Notice, local authorities require to recover any costs for works carried out by them through civil debt procedures. This can be costly and complex and is often unsuccessful with authorities writing off costs.

4 Defective and Dangerous Buildings in Conservation Areas

Inevitably, listed buildings, those that are the subject of a building preservation notice and buildings in a conservation area will be found to be defective or dangerous under the terms of the Building (Scotland) Act 2003. In such circumstances, Section 35 of the Act places a duty on local authorities to consult, with Scottish Ministers, the planning authority or any other person the local authority thinks fit, before serving notices in relation to building regulation compliance, continuing requirements, building warrant notice enforcement, defective or dangerous buildings or carrying out work to a dangerous building. For example, where a listed building presents a danger to the public, a local authority must consult the Scottish Ministers (which would ensure that Historic Scotland was consulted), the planning authority and any other body which they think fit, before it can serve a dangerous building notice on the owner if

¹ Scottish Parliament Submission from the Scottish Government Built Environment Directorate to Local Government and Regeneration Committee 18 January 2012 Agenda item 3 LGR/s4/12/13 paragraph 2.7, p. 15.

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it is reasonably practicable. Subsection (4) of section 35 provides that a requirement in a notice to carry out work in relation to these protected buildings has effect only where it is consistent with the Acts specified in that subsection. For example, a notice served on a listed building must be 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 under the Buildings (Scotland) Act 2003 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.

It is therefore highly important that building standards and planning services liaise very closely when consideration is being given to the service of a notice requiring works to a listed building. Those local authorities with combined management of such services or joint monitoring and enforcement provisions are clearly at an advantage in this regard. Those who take a strategic approach to buildings at risk, including the establishment of buildings at risk working groups, are also in an advantageous position. In any case, the establishment of internal protocols and clear line of responsibility will help avoid doubt and delay.

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 must immediately give written notice of the fact to Scottish Ministers.

Where the safety of the public requires that the works be carried out without delay, the notification, which in such cases may initially be oral, must be given as soon as possible before the works commence. This provision seeks to ensure the earliest possible warning of threats to 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.

Where the need for demolition of a listed building or a building in a conservation area is not immediate, planning authorities should consider whether it might not be preferable instead to issue a Repairs Notice instead.

It can be a defence against the offence of carrying out unauthorised work to a listed building or of causing or allowing damage to it that that works 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 undertaken out were limited to the minimum measures immediately necessary. The defence is 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 to claim the defence a person needs to be able to prove that repair or temporary shelter works were not practicable.

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 such circumstances it would be 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.

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Given this restriction, local 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 to specify demolition or alteration of particularly dangerous parts of a structure only, for example, leaning parapets or pinnacles etc.

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

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 Historic Scotland at the earliest possible opportunity, and certainly before any works are undertaken on site in order that alternative measures can be considered.

Building 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. Remaining structures should be left in a state that protects them from further deterioration. The submission of an application for listed building consent or conservation area consent to demolish allows the planning authority, if it is minded to grant consent, to attach those conditions it sees fit to ensure that the building is left in such a protected state.

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The text contains references to legislation and its interpretation that may contain inaccuracies or be out of date. Ensure you take appropriate professional advice before making decisions relating to property. Feedback, relevant case studies and suggested changes are welcomed.

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