



ENGLISH HERITAGE

English Heritage response to the DCMS Consultation *Improving Listed Building Consent* 22 August 2012

Question 1: Do you agree with the proposal to introduce a system of prior notification of works to a listed building, leading to deemed Listed Building Consent if the Local Planning Authority does not request a full application within 28 days? If not, please clearly state your reasons and your views on the approach you consider the Government should take.

English Heritage believes that a significant number of applications are made for listed building consent for works that do not affect the character of a listed building – that is, applications that are not strictly necessary in law. These applications are likely to be made out of caution given the criminal sanction for failing to apply for consent when it is needed.

A rapid process of determination of such applications would be very welcome.

However, English Heritage has strong reservations about the impact of the proposal where the works would affect the special interest in the building, either positively or negatively.

In either case, the judgement as to the nature of impact and whether it is genuinely positive or justified can be exacting. It may require expert input from consultees such as local amenity societies, English Heritage and the National Amenity Societies. It may be something that is sufficiently concerning for the Secretary of State to wish to consider.

The proposal suggests the ‘deemed consent’ system could be limited to applications where levels of harm are ‘low’ or justified in the interests of keeping the building in its optimum viable use but it is difficult to imagine how ‘low’ harm could be clearly defined and consistently applied. In any event, successive poor decisions of low impact could have a serious detrimental impact overall.

Determining the optimum viable use of a listed building can require a thorough consideration of the impact of alternative uses on long-term conservation. It is something that could require substantial evidence and would benefit often from the input of consultees and the public. If the choice of use is wrong the long-term impacts on conservation could be serious and irreversible.

English Heritage believes that information requirements and consultation steps in relation to listed building consents should be proportionate to the importance of the building and the nature of the impact. However, to remove consultation altogether from some applications (even if they cause only ‘low’ harm) and to somehow limit information requirements (other than on proportionality grounds) threatens the level of protection for listed buildings. Such a procedure would also cut out the very valuable input many voluntary groups and the wider public make when they respond to consultations.

There are potential savings in terms of local authority and consultee resources, but we do not think that such savings are outweighed by the risks to conservation.

So English Heritage believes that the merits in a 'deemed consent' system are limited to those cases where the proposal does not affect the character of the building. In truth what is being decided in such cases is that the works are lawful without consent and as such it would be more appropriate to issue a certificate of lawful works, as proposed under option 3. Option 3 does not describe the process for obtaining a certificate of lawful works, but it clearly could be along the lines of the process suggested for 'deemed consents'.

Question 2: If you are commenting from a Local Planning Authority, are you able to comment on the proportion of your LBC applications which require amendment or the application of non-standard conditions prior to consent? If you are able to supply supporting information, please set it out clearly, or indicate where it can easily be accessed.

N/A.

Question 3: Do you agree with the proposal to introduce a voluntary system of local and national class consents? If not, please clearly state your reasons and your views on the approach you consider the Government should take.

English Heritage fully supports the introduction of a power to local authorities to issue class consents, provided they are subject to the same process and policy considerations as apply to listed building consent and that they do not encompass demolition work.

English Heritage believes that local class consents could work effectively as a type of unilateral heritage partnership agreement; a blanket consent for works of a benign or beneficial nature that applies to many properties of a type, even though they may be in multiple and disparate ownership.

As such they could remove considerable numbers of applications from the system without adverse affect on heritage protection, on the assumption that:

1. They can permit alterations and additions only.
2. They are subject to consultation as if they were a listed building consent application.
3. The Secretary of State has a power of veto, so as to protect the national interest in the same way as applies to listed building consent.
4. They are subject to a maximum review period at the end of which a full consultation will need to take place again before re-adoption, so as to ensure that the scope of works consented is still benign or justified.
5. The statutory duty to pay special regard to the desirability of preserving the building (s16 Planning (Listed Buildings and Conservation Areas) Act 1990) applies to consideration of local class consents.
6. The policies within the NPPF apply to class consents as they do to individual listed building consents.
7. Both the local authority and the Secretary of State can revoke the consent at any time, subject to compensation being payable if it is done immediately, but no compensation if notice is given before the revocation (see procedure for article 4 directions under the General Permitted Development Order).

If these safeguards are in place, then there is no need to limit the scope of the works that may be covered by local class consents. They should be flexible so as to offer the best opportunity to improve efficiency at a local level.

National class consents could be used for a variety of purposes, such as:

1. Exempting certain works to any listed building from the need for consent;
2. Exempting certain bodies from the need to apply for consent, on certain conditions;
3. Exempting certain works to certain listed buildings in land holdings that span two or more local authority areas, such as listed buildings in the national infrastructure network.

While there are groups of buildings at local level that are sufficiently similar that a class consent may be effective without harming protection, listed buildings are generally extraordinarily varied in type and interest. It is therefore very difficult, if not impossible, to conceive of a generalised national class consent that would have any material impact on the consent system without having a potentially very serious adverse impact on the protection of some buildings somewhere.

There already exists a system under which certain bodies are exempt from the need for consent: the ecclesiastical exemption. The essential condition of exemption is that the internal procedures for the exempt body must be as stringent as the procedures required under the secular heritage protection system. Equivalence of protection is a key principle underpinning the exemption. It is kept under review by the Department for Culture, Media and Sport in order to ensure that those denominations which benefit from the exemption maintain the required standards of protection.

English Heritage sees no reason in principle why the ecclesiastical exemption should not be extended to other non-ecclesiastical bodies. However, we are not aware of any body being in a position or expressing a desire to meet the necessary conditions at this moment in time and the costs of setting up such a system and of overseeing it may affect its viability. The heritage experts that ensure the ecclesiastical exemption system works provide their inputs *pro bono* and it cannot be assumed that this would necessarily be the case for other systems of exemption.

English Heritage believes that a power to issue a national class consent is potentially a very useful provision insofar as it removes the need for consent from repeat works to infrastructure or similar property holdings that span local authority borders. To be effective in reducing the burden of the consent regime and maintaining protection, the consent would have to be detailed and perhaps lengthy. Its preparation would involve the sort of direct discussions and agreement that would be required for a heritage partnership agreement. As such, it may be preferable in terms of process efficiency if there was a means of entering into national heritage partnership agreements, provided of course, that relevant local authorities were consulted and could opt out in favour of a local heritage partnership agreement.

Question 4: If you are commenting from a Local Planning Authority, are you able to comment on the likely applicability of this option within your area, in terms of the kinds of listed building and type of works to which it might be applied? If you are able to supply supporting information, please set it out clearly, or indicate where it can easily be accessed.

N/A.

Question 5: Which of the options set out in this consultation to reduce the number of LBC applications for works with limited or justifiable harm to special interest (Options 1 and 2) do you prefer? Please state the reasons for your preference.

Options 1 and 2 are not mutually exclusive, but we have expressed reservations above about the extent to which option 1 can apply without harming heritage protection.

If option 1 is limited to works that do not affect the character of the listed building then it is effectively a certificate of lawful works that should be issued. Option 3 should then be taken up in its place, but using the process efficiencies set out in option 1.

Local class consents under option 2 are an effective means of reducing the burden in a way that responds properly to the special interest in the listed buildings.

Question 6: Do you agree with the proposal to introduce;

- a) a Certificate of Lawful Works to Listed Buildings for proposed works;
- b) a Certificate of Lawful Works to Listed Buildings for works already undertaken?

If not, please clearly state your reasons and your views on the approach you consider the Government should take.

For the reasons given above, English Heritage strongly supports the introduction of Certificates of Lawful Works in that they offer clarity to developers and owners as to works that do not require listed building consent. Advantage will flow not from there being a separate process, but from that process having as light a touch as necessary to make sound decisions. For that reason we suggest the process efficiencies suggested for 'deemed consent' under option 1 are applied to certificates of lawful works.

English Heritage supports certificates for proposed works and for works undertaken.

Question 7: If you are involved in the Listed Building Consent system either in a Local Planning Authority or any other capacity, can you provide further information on the following;

- a) possible numbers of LBC applications currently made due to the lack of a formal mechanism for LPAs to confirm whether or not consent is needed;
- b) the numbers of informal requests received or made every year concerning the need for LBC;
- c) how such queries are handled?

N/A.

Question 8: Do you agree with the proposal to introduce a system whereby accredited independent agents provide expert reports on LBC applications directly to the LPA? If not, please clearly state your reasons and your views on the approach you consider the Government should take.

English Heritage sees possible potential in a scheme of accreditation as a means of raising standards in the assessment of heritage impacts and of avoiding duplication of effort between applicants and the local authority.

However, there remains the fundamental question of whether it is practicable to set up a holistic accreditation scheme or schemes given both the breadth of skills required and the availability of organisations that could run it.

It is likely to be of most use, and least risk, where impacts on special interest are low, or are entirely justified in the interests of keeping a building in its optimum viable use. More complicated cases go beyond historic environment considerations and these will be beyond this scheme, relying on the wider professional planning inputs which the local planning authority can make. There is a risk of disrepute if the scheme envisaged in this proposal were to go further.

We suggest that a scheme including accredited agents would need a robust and credible accreditation system for individuals, with a mechanism for the Secretary of State, perhaps advised by EH, to oversee the process to ensure that appropriate professional standards are applied by the accrediting body/bodies.

Accreditation and reporting must include an expression of the duty owed to the local planning authority to give objective advice in the context of the statutory and policy responsibilities of the local authority, including the statutory duty to have special regard to preservation, etc (s16 of the Planning (Listed Buildings and Conservation Areas Act 1990), the National Planning Policy Framework, local plan policies and all related guidance, where relevant.

The function of the agent seemingly can only extend to an objective assessment of the impact of the proposal on the heritage significance. It cannot reach into the overall merits of the decision as that would give rise to an obvious conflict of interest between the party paying for the service and the decision-maker – the local authority.

But even if a satisfactory framework could be put in place, English Heritage has very strong reservations about the reliability of general heritage accreditation given the extraordinary diversity inherent in the significance of heritage assets.

It is conceivable that sub-categories of expertise may be established, but this raises further difficulties as to: who decides what expertise is needed; whether more than one expert is needed; which body accredits which individuals; and who oversees the standards of the bodies if there is more than one.

In any system, there will remain the risk that the commercial interests of the agents make them inherently biased towards the applicant from whom further instructions might flow, either directly or by referral. A robust sanction would need to be in place so that it could be applied to an accredited professional where bias was demonstrated.

Although the risk of bias could be reduced by professional accreditation, the value judgements inherent in assessing heritage significance mean that there is scope for a perception of bias affecting an expert's view without it being overt. Local authorities may therefore mistrust the advice of an accredited agent and seek their own in any event (a right they must be able to retain). Alternatively, local authorities may take advantage of this new system to justify disposing of staff who currently have the expertise to challenge the view of the accredited agent and the bias may lead to adverse decisions going unchecked.

On balance, therefore, English Heritage believes that a system of professional accreditation would be complex to introduce, controversial among many with an interest in heritage, and could have unexpected and potentially serious negative outcomes. If government wishes to take forward the

concept, English Heritage advises that time is taken to explore it further with interested parties and to produce a more detailed scoping report outlining advantages and disadvantages and the processes that would be necessary to achieve accreditation.

Question 9: If you are commenting from one of the professional institutes listed, are you able to comment on the likely impact on your institute of establishing, monitoring and administering such an accreditation system to support this option? If you are able to supply supporting information, please set it out clearly, or indicate where it can easily be accessed.

N/A.

Question 10: How should the existing heritage accreditation scheme be modified or replaced to accommodate this proposal? What professional standards and enforcement would be needed to cope with the potential conflict of interest, and should agents' scope be constrained through national government?

See answer to question 8 above.

Question 11: Should the proposal for advice be extended further, as some stakeholders have suggested, for example allowing accredited agents to certify LBC directly themselves?

Given the risk of conflict between regulatory function and personal interest, it would not be appropriate to extend the use of accredited agents to the certification of listed building consents themselves or the granting of consents.

A certificate of lawful works should enable the most efficient handling of non-controversial casework. All other casework involves potentially harmful work being justified on some grounds – potentially grounds of some concern to a local authority.

Leaving a balanced planning decision about public benefits versus heritage harm in the hands of a private consultant paid for by the applicant and without an opportunity for public scrutiny, consultation and overview by the local authority is unsound in principle, whatever accreditation the agent may have. It would give rise to a very significant risk to heritage protection in England.

Reform of Enforcement Powers for Buildings at Risk

Question 12: If you are commenting from an authority which is able to take action under Enforcement and Compulsory Purchase powers, can you give any examples of where you have done so, or can you comment on the reasons why you have chosen not to?

N/A.

Question 13: Do you consider that amending the legal powers relating to Urgent Works Notices, Repairs Notices and Compulsory Purchase could be effective in encouraging authorities to pursue cases of neglect to listed buildings? If so, please clearly state your reasons.

URGENT WORKS NOTICES

Urgent works notices can only apply to unoccupied buildings or the unoccupied parts of occupied buildings (s54 Planning (Listed Buildings and Conservation Areas) Act 1990). This restriction can

give rise to avoidance tactics, such as using a generally disused building for storage, and creating doubt about what parts of a building (such as a roof) can be said to be occupied.

The draft Heritage Protection Bill proposed replacement of this condition with a condition that urgent works should not be carried out on residential properties to the extent that the works would interfere with that occupation. This would strike the right balance between the need to carry out as much of the necessary repairs as possible and the obvious need for the owner to continue to live in their home. It would circumvent avoidance tactics and would remove an obstacle to the service of such notices.

The draft Heritage Protection Bill also proposed the removal of the requirement for the works to be 'urgent' in order to form part of the notice. There is obvious scope for considerable argument about what is urgent and how one can tell. It is difficult to predict when a building might collapse and it may be only after the event that it becomes obvious that repairs were urgent.

In our experience local authorities are inhibited from issuing urgent works notices or from including a proper package of measures within them because they are concerned that they cannot prove the threat of loss is imminent and that accordingly they may not recover the costs of executing the notice.

The works would still have to be demonstrably necessary for the preservation of the building.

COMPULSORY PURCHASE

The cost of a compulsory purchase order (CPO) is clearly a very significant factor in whether they take place or not. If the compensation payable exceeds the value of the property in the hands of the acquirer (the local authority or often a buildings preservation trust) then that is likely to prohibit the CPO. Given the objective of the acquirer is conservation alone, the value in their hands is that reflected by 'minimum compensation' as defined in the Planning (Listed Buildings and Conservation Areas) Act 1990.

However, under the Act currently minimum compensation may only be paid if it can be demonstrated that the building has been deliberately allowed to fall into disrepair for the purpose of justifying its demolition and the development or redevelopment of the site or an adjoining site.

This is very rarely the case and difficult to prove even where the circumstances may indicate foul play.

The draft Heritage Protection Bill provided that a local authority has the discretion to include a direction that only minimum compensation be payable in the CPO. The decision by the local authority would have to be reasoned and justifiable. It may amount to a breach of human rights if the authority's decision is not based on proper public interest grounds and may also be subject to judicial review. Some of the factors that the local authority may wish to consider include:

- the financial position of the owner
- the care of the property shown by the owner
- the owner's response to the repairs notice
- the value of the property in the acquiring party's hands
- the condition of the property and its importance

We also believe that the extent of land that can be acquired with the listed building should be clarified as any land that has been used in connection with the listed building. Currently the

wording constrains the additional land in such a way that it threatens the viability of the land holding in some circumstances and can break the integrity of a historical entity, such as a house and its parkland.

Question 14: Can you propose any further changes or amendments, including non-statutory changes, beyond those suggested here, which would provide additional benefits or improvements to protect Buildings at Risk?

English Heritage is currently in discussion with DCMS on a package of non-statutory measures by government, English Heritage and local authorities to resolve issues with buildings that are at risk for a long time. These include: improving information about development potential for buildings at risk; updated list descriptions for long-running buildings at risk; establishing positive relationships with developers; the encouragement of philanthropic funding; the use of business-rate discounts on buildings at risk; and other measures where flexibility and practical help would be of assistance.

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