ENGLISH HERITAGE

Penfold Reforms and the Enterprise and Regulatory Reform Bill

Notes of Sectoral Discussion 2

English Heritage Offices, 16 August 2012 10:30am

Background

The DCMS consultation on the reforms to Listed Building Consent originated from the Penfold Review of non-planning consents in 2010, and the Government's pledge, in November 2011, to consult on (and implement) reforms which would:

- scrap unnecessary development consents and simplify others
- reform the remits and working practices of the public bodies granting or advising on development consents
- set a clear timescale for deciding development consent applications
- make it easier to apply for development consents

As part of the Civil Service Reform Plan, on July 27th 2012, the Cabinet Office also issued new Principles for Consultation.

The new principles no longer require a default consultation period of 12 weeks, particularly where extensive engagement has already occurred.

The Government is keen to reform the Listed Building Consent (LBC) system and the coming Enterprise and Regulatory Reform (ERR) Bill, which will get its 3rd reading in Parliament this Autumn, is seen as a good opportunity through which to do this.

As a result, the consultation period for the reforms to LBC has been set at 30 days in order to meet the timetable already established for the ERR Bill.

Despite concerns about the shortened consultation period[1] the group who attended the discussion hosted by English Heritage on the 16th of August attempted to focus rather on the issues raised by the options proposed. The notes which follow are a summary of the main points of the discussion. They do not represent the official position of English Heritage nor do they necessarily reflect all the views of those who attended.

English Heritage's objective in circulating these notes is to maximise engagement with and (contribution to) the consultation in the tight timescale and to encourage interested parties to take the opportunity to comment on any reform package that emerges.

The deadline for consultation responses is 23 August 2012

Consultation responses should be sent to: listingsconsultation@culture.gsi.gov.uk

[1] On the 9th of August 2012, the RTPI, on behalf of several sectoral bodies, presented a letter to Government in which they expressed concern that the 30 day consultation period was not a proportionate or realistic timeframe in which to allow stakeholders to provide a considered response to changes to the LBC regime. Further details can be found here: http://www.rtpi.org.uk/briefing-room/news-releases/2012/august/just-30-days-for-views-on-listed-building-consent/

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Option 1: A system of prior notification leading to deemed LBC

DISCUSSION:

This would only really apply to applications which don't need consent in the first place. It is likely that deemed consent might not be forthcoming if the application:

- needs more information about the work
- needs consultation
- needs a lot more detail on the significance

'Making more work'

Many in the room felt that the LBC process *is*, actually the most appropriate method for dealing with works that do not require LBC. The current process gives local planning authorities the prerogative to control what gets done and removes the risk of applicants doing work they're not supposed to. Sometimes, there are so many conditions attached to changes that do not require consent, that the applicants might as well have gone through the LBC process. With a deemed consent system, these sorts of cases might get missed out and that might mean substantial harm to some assets.

Several conservation officers in the meeting said this option appeared to be a solution for a problem that they don't believe exists, saying, "We rarely get LBC for work that doesn't need LBC, because we either tell them it doesn't need LBC or it gets mopped up by PreApp."

It was granted, however, that in LPAs where there is a lack of confidence or expertise or where staff are not as efficient – or indeed not present – giving different track to different types of application might have some worth and speed things up for the applicants' sakes.

In terms of reducing bureaucracy, this option could only work in practice if there was a 'no response' default and no one in the group thought this was a good idea. Option three was considered more workable.

Expertise

The conversation returned again and again to the issue of expertise. It was generally felt that the proposed options are trying to address a problem in LPAs which do not have the expertise to make the decision about what does or does not require LBC. But formalising what happens already in many 'good' LPAs would be punishing those who are already working well with the existing system by creating another tier of bureaucracy.

Many agreed that in cases where there is not enough expertise or confidence within an LPA, the default reaction might end up being to ask for LBC on everything. This would in effect, create more work for staff and would not really save time or money. Also, if the LPA was not confident that enough information was being submitted in a deemed consent application, again, defaulting to full LBC would become the norm. This is not ideal.

Someone pointed out that a big part of the job of a Conservation Officer is to deal with the general public - people ringing up informally and asking about whether or not they need LBC. That is not going to change. The informal contact is crucial – time-consuming, but crucial – there is, and always will be in some circles, an elementary ignorance about listed Buildings. A way to streamline this process therefore is to ensure that the LPA has the expertise to deal with these queries in an efficient manner, not passing the buck by asking for LBC or PreApp and certainly not by creating a new form of consent…

There is a distinction to be made in this process between owners who have a lot of sites and owners who didn't even know that their building is listed. They will have very different needs and expectations.

Speed

One participant suggested that if the intention is to speed up the LBC process, then finding a way to ensure that LBC validation/registration could get done within 4-5 days, would be better than any of the proposals on the table.

There were questions about the appropriateness of a 28 day period for deemed consent: "Even trees get six weeks!" and deemed consents from utilities operators get eight weeks.

From an owner's perspective, a letter saying 'LBC is not required' or something like that is all that they need. If it could be made legally reliable, it would be most useful for conveyancing. If an LPA could be given the authority to produce something similar to English Heritage's standard 'No Need to Consult' letters, this would be most welcome.

Everyone agreed that when dealing with deemed consent, the LPA would have to have a positive responsibility towards granting it and that nothing could be allowed to happen until a piece of paper was issued. It would not be practical to operate on a 'do not respond' basis because this could mean many things might get deemed consent when they really shouldn't have. What if the conservation officer was on leave or if there was a vacancy or if things got 'lost in the post' or didn't arrive in time (like the Firestone factory Listing decision)?

One conservation officer pointed out that there have been many problems with deemed consent in the telecoms sector in the past – that there has been public outcry because something got through that shouldn't have because the officer was on leave or otherwise away. That does not seem to be a very 'Localist' approach to planning.

Further Reductions to Conservation Staff

There was some concern that the net result of the proposals would be to reduce LBCs and as a consequence therefore, reduce the number of LPA conservation officers. Yes, some of the options might arguably free up conservation officers to focus on the more complex LBC cases or other types of work, but this group felt that it would be more likely that a reduced workload would lead to a slimmed down or deleted post – especially in LPAs that do not appreciate or value the work that conservation officers do.

One participant suggested that the reason for the decline in numbers is that conservation is seen as expendable and LPAs often fail to appreciate the expertise and training involved. One surefire way to make LPAs value their conservation staff is to make them fee-earners. Another way to counteract the decline in numbers might be by making the role of a conservation officer a statutory responsibility somehow. That being said, this is already the case as it is already possibly to take an LPA to judicial review for failing to fulfil its duties. In practice, though, how often does this really happen?

Another participant reminded everyone of the bigger picture: In reality, LPA budgets are going to continue to fall and conservation staff will inevitably be affected. It will be hugely important, therefore, that responses to this consultation highlight conservation officers' unique expertise and the important contribution they make to the planning process. Yes, let's make their lives easier, but do not give LPAs an excuse to get rid of them. This could eventually lead to a real divide between those LPAs that 'do' heritage well and those who don't even employ the staff to do the job badly.

Revenues

This option might actually take revenue away from an LPA because applicants would bypass PreApp and go straight to an application for deemed consent or LBC. In practice, this probably happens already but this option would make it worse.

Option 2: A system of local and national class consents granting deemed Listed Building Consent

DISCUSSION:

At a Local Level:
Local class consents would be potentially good for removing repeat applications. It would be, in effect, a unilateral HPA undertaken by LPA with owners (eg. for works to flats in the Barbican). Being a form of blanket LBC, it would have to adhere to statutory and Local Plan requirements, have a periodic review process, and need extensive consultation. This is envisaged as an enabling provision for LPAs, they wouldn't get penalised if it they didn't do it – a bit like an inverted Article 4 direction.

Also, care would have to be taken about the cumulative impacts of a consent scheme like this. How would it capture and control works buildings that are worth preserving?

It is likely that this would only really be workable in places where this is some homogeneity of LB stock - such as terraces of housing – or where the stock is very well understood – probably mostly in urban or built-up areas then. There is likely to be overlap with Conservation Areas – how would this provision relate to unlisted buildings?

The long-term efficiency savings of a blanket HPA might be worth the heavy front-end investment, but an LPA would have to be convinced of this before justifying the expense. This would work for estates or areas that would naturally qualify for existing HPAs. The articulation of the process is going to be important – if it is too onerous it will put LPAs off.

Many agreed with the notion that local class consents could work for businesses and would encourage the growth agenda.

At a National Level:
There are three different types of National Class consent that might come of this process:

1. Consent for one type of work to ALL Listed Buildings (ie. 'This one thing can be done without consent to any LB')

The group considered this impractical because of the huge diversity of the LB stock. No one could think of a set of class consents that would work – not even repairs (one man's repair is another man's vandalism). Even if some form of class consent could be devised, conditions would probably have to be attached in a large number of cases, making this an ineffectual exercise in the reduction of bureaucracy.

One participant asked whether this option is aimed at making it easier to do works to interiors – is it secretly a deal with the Green lobby to encourage people do more insulation etc in their buildings without consent? This concern was swiftly allayed by the presenters.

2. Consent to some groups to carry out works without LBC (ie. 'The organisations listed below are trusted to do what they want to LBs').

In practice, this already exists – it's Ecclesiastical Exemption. It might be possible to do this with other big organisations, for example, infrastructure bodies, who would have to create parallel systems of internal control equivalent to the local government system. The general consensus amongst this group was that the EE model would be too onerous for any body really to consider putting it into operation – as such a body would need to have an in-house mechanism for taking enforcement action against itself. The general consensus amongst this group was that the ecclesiastical exemption does not always work well and so this is unlikely to work in the real world without damage to the LB stock.

3. Certain bodies are granted permission for specific types of work (ie. 'Organisation A can do B types of work to C types of buildings').

This would, in effect be a form of National HPA – which could be useful for bodies that cross many LPA boundaries – such as train, motorway or waterway bodies. Again, the attendees at this session were sceptical about how this would work in practice. For example, in the experience of one conservation officer present, given how regularly Network Rail operate without getting the necessary consents at the moment, giving them license to do as they please would be disastrous.

Also, although the benefits of Local HPAs are clear, how would national HPAs help to reduce bureaucracy on a local level?

Option 3: A "Certificate of Lawful Works to Listed Buildings"

DISCUSSION:

This option was definitely preferred by this group to Option 1. It was agreed that in the commercial world, CLW will enable businesses to get finance for development and clarity in conveyancing. That promotes growth.

Some in the room, however, could not get their heads around the idea of bypassing the LBC process. They felt that applying for full LBC was the best and only way of determining whether an application needed LBC or not. For this reason, they felt, much like they did with Option 1, that introducing a CLW would just be adding another tier of bureaucracy to what they already do.

What about consultation? Who would be consulted? Would it depend on the degree of work – eg. Demolition would never get CLW?

<u>Retrospectives:</u>
Many in the room were uncomfortable with the idea that CLWs might be able to be issued retrospectively. It was acknowledged that it would be in the interests of property owners or buyers who were looking for certainty in their transactions, but it was felt that allowing retrospective CLW sent the wrong message and would encourage people not to declare works in the hopes that they could get away with it at a later date.

There was also the issue of 'unknown unknowns' as well. How could an LPA issue a CLW if it was not possible to ascertain what had been removed and therefore whether it was significant or not and whether it would have required LBC? By that same token however, if an LPA has no evidence of what was there before, what grounds would they have for refusing a retrospective CLW?

If LPAs have to be convinced of the lawfulness of the works, then surely they could refuse to issue a CLW because they don't know? This is currently what happens with COIs. DCMS reserves the right not to issue one if it is not certain that the building is not worthy of listing. It might become the default position for LPAs to never issue retrospective CLWs in order to hedge their bets and discourage retrospective applications.

If applicants didn't obtain their retrospective CLWs, they would be forced to apply for retrospective LBC – thereby adding to the LPA's workload. And what if LBC were then refused? Would the LPA have the resources to pursue cases where the law has been broken? Would this mean more cases? Rather than a CLW, perhaps less provocative approach would be for the LPA to issue a letter saying it will take no action.

<u>Bureaucracy</u>
How is a CLW meant to speed things up and reduce bureaucracy? It was widely agreed that both options 1 and 3 would in effect be formalising activities which the 'good' LPAs already do in practice.

By forcing everyone to do them, it is creating more processes and more tiers of bureaucracy which the 'bad' LPAs will have to adhere to (badly) and the 'good' LPAs will have to work around.

Fee charging
One participant suggested that if options 1-3 are implemented, there should be a fee involved because this would support the retention of conservation officer posts. As income earners, conservation officers will be more valuable to the LPA and be less likely to be cut.

If fees could be charged for CLW, then the fee for retrospective CLW should be a multiple of the regular fee in order to discourage people from carrying out works before consulting the LPA.

Option 4: Replacing local authority conservation officer recommendations for LBC by those made by accredited agents, if LBC applicants wish to do so

DISCUSSION:

There were two degrees of involvement envisaged here:
1. Accredited agent issues a report that LPA can rely on to determine LBC
2. Accredited agent issues LBC for some works

Step 1 in more detail:
If it was made a requirement that accredited agents have a duty of care to LPA under the terms of their accreditation, then LPA might not have to go anywhere else for a second opinion.

Several people pointed out that in practice, this is what applicants' agents already produce in Design & Access and/or Heritage statements. They also stressed the need for an in-house expert ability to cast a critical eye over these documents when they are submitted. How would LPAs with no heritage experts deal with this? Again, it appears that these proposals are meant to help LPAs that are doing a bad job of things, with very unclear benefits to LPAs with highly active and expert conservation departments immediately obvious.

The risks of this kind of system going wrong are higher and therefore the types of cases this would apply to would be smaller and milder. In which case, is there really a saving to be made?

Bias
Most in the room agreed that in terms of step 2, it is unlikely that a consultant would work up a client's proposals only then to reject them. This raises obvious questions about an agent's ability to be impartial and work on behalf of the LPA, not their client.

There was agreement in the room that a consultant paid for by the developer could not be relied upon to always be disinterested. A conservation officer can – because that's their job.

Transparency
Also, the consultation issue is huge – elected members are often swayed by community representations. If a conservation officer is not involved and the committees are making a decision made on recommendation by the employee of an applicant, the community are more likely to persuade the committee to refuse the application on the grounds of a lack of trust alone. Members would object on the basis of a lack of transparency. This goes against the trend of the last few years on how LPAs should conduct themselves.

The only reason this would work is if applicants don't like the recommendation by the conservation officer and appoint someone who will tell them what they want to hear instead. Planning Committee members are not going to want to put themselves in this position.

One participant said it was 'apples and oranges' to compare LBC and building control: Building control officers make objective technical assessments based on fixed criteria. Conservation officers, on the other hand have to make more nuanced, subjective judgements about impacts on asset's significance.

Also, what if because an owner went to an accredited agent, the conservation officer never got sight of the application? There is a huge potential for accumulated harm. What would the planning committee say if they knew nothing about decisions that later came back to them through unhappy constituents?

Quality of Advice

Conservation officers – the best of them – have the best local knowledge, expertise and experience. Agents are an applicant's advocates and will not necessarily be local – specially if they're cheaper elsewhere. This could call into question the quality of the advice that applicants will be receiving.

For the system to work, it would have to be a very rigorous accreditation system with internal mechanisms to deal with unprofessional or unethical behaviour. Where would the resources come from to positively police this system? The LPA would have to have the knowledge and resources to be able to start and follow through a major complaint against an accredited agent. What about an LPA with no conservation officer which doesn't have anyone with the expertise to denounce the cowboys? And how would one regulate agents who make genuine – but potentially quite harmful – mistakes of judgement?

Again, there was a general consensus that the consultation is sending out the message that conservation staff are not valued. It was noted that the dialogue between conservation, planning and building control officers is an important part of a cohesive LPA service delivery. Outsourcing the conservation officer would mean an increased risk of applicants deviating from the original plans.

One suggestion from the group was the idea that rather than outsourcing conservation expertise to private sector consultants whose impartiality could not be relied upon, LPAs should be sharing services and relying on the expertise of neighbours. In fact, it is already possible for LPAs to provide consultative services to each other (and indeed to their own estates departments) for a fee. If conservation officers can be seen to be fee-earners, their worth in the eyes of both Government and the LPAs will increase.

Additional Questions:

1. With wider planning issues, could those accredited agents be trusted or able to make a judgement beyond significance – eg, the public benefit of a new primary school balanced against a highly significant heritage asset? Surely that is something solely for the LPA?
2. What would the accreditation look like? Would it be general or specialist?
3. Would indemnity insurers even cover an arrangement such as this?

Reform of measures available to address building neglect:

DISCUSSION:

DCMS are keen to hear what it is that stops LPAs from doing more to tackle Buildings at Risk – we have an opportunity to fix this now. Send your ideas to them.

There were some proposals in the old Heritage Protection Bill:

- Removing urgency from Urgent Works Notices (UWNs)
- Being able to carry out works on occupied buildings
- Compulsory Purchase Orders (CPOs) and minimum compensation

Prohibitive Costs and Risks

Several people in the room agreed that the main block on LPAs tackling HAR is the cost and the risk of further costs. Like the August 9th session, many also complained of the difficulties of chasing owners who skip abroad or hide behind shell companies etc. – adding years to the process. There should be a way to serve notices more quickly.

There were also issues over the distinction between a permanent repair or minimum works – for example chucking a tarpaulin over the hole in the roof versus replacing the ten missing tiles.

A Middle Ground Repairs Notice?

There needs to be something between an Urgent Works Notice and a repairs notice. It is not helpful that the only thing one can do if an owner fails to respond to a repairs notice is CPO – it's too drastic. If the buildings' been like that for 20 years, it's probably not UWN but something to stop the roof from caving in or cleaning it up might be useful – some kind of 'Preservation Works Notice'? This could be for 'all works necessary for the ongoing preservation of the building' or something like that. Removing the urgency requirement from urgent works notices would help.

Repairs to Buildings in Occupation

It was also noted that a lot of people who don't look after their buildings are occupants and many would be more than happy for the LPA to go in and carry out repairs. At the moment, the legislation does not allow this because it is not possible to repair occupied dwellings. If this could be changed it might make a difference, provided the occupants ability to enjoy the use of that property was not interfered with – that being said, this would exclude any work to tackle dry-rot…

Additional Questions for tackling HAR

- Being able to restrict use changes (possible through the use classes order) might prevent threats from unsuitable uses.
- What about buildings which have deteriorated so badly that they are verging on being delisted? How to save them?
- Find a way to prevent owners from obtaining planning gain by allowing a building to deteriorate
- In the case of C20 buildings, someone asked about the possibilities of interim protection – preventing owners from neglecting buildings in order to make them less 'listable'.

Additional Comments:

It was pointed out, again, that the Consultation Impact Assessment is short on credible evidence of the impacts and benefits. No-one thought the figures looked right.

Someone asked for details of the 'previous engagement' which had made a 30 day consultation period possible. It was explained that this was the wide-ranging consultation that EH conducted, in quite a lot of depth, on behalf of Government on the proposed improvements suggested in Penfold and how they might be implemented. Indeed, some of the ideas that resulted from that consultation are reflected in the current proposals.

Several in the group expressed their dissatisfaction with the existing consultation arrangements, especially with the coincidence of summer holidays and Olympics. There was concern that many LPAs will not find out about the consultation until it is too late.

Whilst an opportunity to change the system was welcomed, several participants also expressed concern that so much of the consultation documentation says, 'to be developed'. How are consultees expected to comment on such scant detail?

Emphasis was also placed on the importance of responding to this consultation despite the difficulties, and of highlighting the challenge of commenting in detail when no detail is provided. It was agreed that

Government is obviously looking for a steer from the sector as to what the best way forward is, and the sector *must* therefore respond.

Attendees:

The 25 people who attended the August 16th morning discussion on DCMS consultation on the reforms to Listed Building Consent came from the following organisations:

- Civic Voice
- IHBC South East
- Transport for London (TfL)
- Princes Regeneration Trust
- Victorian Society
- The 20th Century Society
- Bath Preservation Trust
- Local Authorities:
  Winchester City Council, LB Bexley, LB Hounslow, Westminster City Council, Horsham DC, Reigate & Bansted Council, Waverley Council
- Private Consultancies:
  Terence O'Rourke, SouthDowns Environmental, Conservation & Design PD, Feilden Mawson LLP

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