REVISED SUBMISSION FROM THE HEADS OF PLANNING SCOTLAND (HoPS)

The planning context

1. The Scottish Government aims to deliver a modern planning system that is—
   - Efficient: up to date development plans at the heart of an efficient system that provides certainty
   - Inclusive: local people more involved in the decisions that shape the development of their communities
   - Fit for purpose: with a clear sense of priorities, and to address different issues in different ways
   - Sustainable: development contributing to sustainable economic growth - in the right place, and of the right quality.

   It is assumed that these are the criteria against which the Bill should be assessed.

2. This Bill forms part of the wider streamlining of the heritage framework – which has seen the related guidance move from the Memorandum and separate national policy guidance (NPG) (NPG 05 on archaeology and NPG 18 on the historic environment), Scottish planning policies (SPP) (SPP 23) and replaced by the consolidated SPP (paras 110 to 124), the Scottish historic environmental policy (SHEP), and the emerging historic Scotland managing change series. The planning advice notes (PANs) (PAN 71 on conservation areas and PAN 42 archaeology) are not as yet affected. Whilst this has sought to broadly leave the guidance framework unchanged – there are areas where the lesser detail will now require Historic Scotland (HS) “Managing Change” series to pick up some of the omitted detail (related to demolition; enabling development; setting; etc).

3. Mindful of this important transition (and thus the material weight to be accorded) from legislation, through national policy to national guidance and advice, to local policies and guidance, it would assist if the higher level guidance was to formally recognise and ensure that due weight is attached to the lower level guidance. Whilst this provides the flexibility needed, there should be a strong emphasis placed on the value of promoting good practice consistently at all levels.

4. The Bill also needs to be seen in the context where the present system is perceived not to have sufficient problems to warrant major legislative reform. The response to the Historic Environment Advisory Council for Scotland (HEACS, now defunct) report on Heritage legislation (August 2006) concluded (December 2007) that “it would be more efficient and effective to invest our resources in improving the workings of the current system”. The then Minister continued, saying that “improving the system relates in part to the clarification of roles, duties and responsibilities; which brings me to your report on local authorities. We do not wish to impose new duties or burdens on local government. Instead, we want to develop
outcome agreements with local authorities, in keeping with the general approach adopted in our new Concordat with CoSLA."

5. Within this context HoPS is supportive of the general principles of the Bill and welcomes the approach to tidy up and align the approaches to unauthorised works and to enforcement. The Bill does not impose new duties or burdens, but rather seeks to streamline the existing powers and align listed buildings, scheduled monuments with the planning enforcement process. The required compilation and maintenance by HS of an inventory of gardens and designated landscapes and of battlefields (s.11 of Bill) is welcomed.

6. Sharpening the powers in the amending bill is welcome - as far as it goes. The Committee may however wish to question HS as to the extent to which the powers are actually being used in practice, and the extent to which the current framework is ensuring that the built heritage is contributing positively to the agreed national outcomes, the most relevant of which are—
   • We value and enjoy our built and natural environment and protect and enhance it for future generations
   • We live in well-designed, sustainable places where we are able to access the amenities and services we need
   • We take pride in a strong, fair and inclusive national identity
   • We live in a Scotland which is the most attractive place for doing business in Europe
   • Our public services are high quality, continually improving, efficient and responsive to local people’s needs and
   • We realise our full economic potential with more and better employment opportunities for our people.

7. The SHEP (para 1.13) identifies Scottish Minister’s key outcomes—
   • Key Outcome 1: that the historic environment is cared for, protected and enhanced for the benefit of our own and future generations.
   • Key Outcome 2: to secure greater economic benefits from the historic environment.
   • Key Outcome 3: the people of Scotland and visitors to our country value, understand and enjoy the historic environment.

8. However, despite the Scottish Environment Link Report (with its heritage targets in section 5) there is not as yet clear guidance from HS as to how these objectives should be measured.

9. Whilst some concerns have been raised regarding the status of the Historic Environment Record (HER) it is considered that the requirement that planning authorities "should ensure" that they have access to a SMR/HER in para 124 of the SPP addresses this concern.
The data context – or lack thereof

10. The latest data context is the Scottish Historic Environment Audit (SHEA) of March 2007 and draft SHEA 2010. The lack of consistent and up-to-date data is of concern – with HS yet to define heritage targets or clarify the annual data needing collection (whether through e-planning system or through LA Conservation Officers). No data is understood to be available on the use of listed building enforcement action, or the use of urgent works or repair notices. The draft SHE Audit 2010 indicated that—

- There are approximately now some 47,540 (47,329 in 2007) listed buildings and 8,151 (7,882 in 2007) scheduled monuments in Scotland (fig 27). Some 27,573 (58%) (27,782 (58%) in 2007) are Cat.A or Cat.B listed buildings. There is a small increase in Conservation Areas to 638 (of which it is understood some 32% (204) have an appraisal (LAHEF July 2010).

- The number of listed buildings demolished or suffering fire damage was unavailable in 2007 (fig 27, SHEA). The draft 2010 data suggests 418 Cat.A fires in 2008/09 – improving on the 509 CAT.A fires in 2007/08.

- It is not however clear how many listed buildings or scheduled sites are in “a poor, very poor or ruinous condition” in Scotland. From the buildings at risk survey by the Scottish Civic Trust (Jan 2006) of some 3,055 buildings (6% of total LB) – some 851 (28% - down from the quoted 1,036 when non-listed buildings are excluded) were identified as “at risk”, and 676 (some 22%) were assessed as being in “a poor, very poor or ruinous condition” (buildings at risk survey Jan 2006). HS subsequently limited the survey to Cat A listed buildings only so it remains difficult to know the extent of the problem.

- In England the 2010 Heritage At Risk (HAR) report provides useful annual data, not just on buildings, but also on the condition of monuments and other designations (81% return, e-survey). It indicates that the 3.8% of Grade I and Grade II* listed buildings at risk in 1999 had been reduced to 3.1% in 2010. Of the 968 LB’s At Risk some 676 (70%) are identified as being in “a poor, very poor or ruinous condition”. If applied to Scotland, this would crudely suggest at least some 603 Cat A or Cat B listed buildings in Scotland would be in a “poor, very poor or ruinous condition”. By comparison, the 2009 BARR in Scotland suggests 8.7% (277 out of 3199) of A-listed buildings are at risk – varying from 6% in urban areas and small towns, to 14% in rural and remote areas. Some 42% of these A-listed buildings (111 – or 3.47% of 3199) are considered to be at high or critical risk. The similarity to the 2006 BAR data (para 44) suggests either very little overall change or lack of up to date data.

- Local variations in the 2010 English heritage at risk survey show that between 1% and 16% of all listed buildings being at risk - equivalent to somewhere in the region of 473 to 7,500 LB in Scotland. This is consistent with the 11.2% (35/311) number of LB on the BAR Register in my authority.
• The 2010 HAR survey goes on to suggest that only between 12% and 13% of buildings on the at risk register are “economic to repair”, but that some 44% are capable of beneficial use.

• It may be noted that 8.2% (3,250) of the 39,409 planning applications determined in Scotland in 2009/10 (planning statistics report) related to separate listed building or conservation area consent applications (table 29 and 32). The 6,233 planning enforcement cases taken up (table 26) in the year are not broken down to show heritage cases. HS should have the data on scheduled monument applications – if not on their condition. In the absence of specific data, it is suggested from experience that the number of heritage enforcement notices is likely to be considerably less.

11. This concern at the lack of an up-to date or comprehensive database or system for rolling updates of the SHEA Audit extends to the lack of up-to-date data on the actual use of the legislation being amended, and thus an inability to assess the extent to which it is “fit for purpose”. Suffice to say that there are a substantial number of Listed Buildings in Scotland not being maintained by the current owner which hinder achieving the national outcome targets (paras 6 and 7 above). The lack of such data also, for example, hinders the targeting of HS or HLF grants towards reducing the number of buildings on the BAR Register.

Key issues

12. Experience suggests there are a number of potential reasons for the low usage of the legislation now being amended – some of which are reflected in the calls for more substantive legislative changes.

Staff skills

13. It is essential to have staff with the relevant heritage skills – in line with SHEP para 1.16(f) which suggests the relevant bodies with responsibilities for any aspect of the historic environment should ensure that: “suitable knowledge, skills, materials and technologies are available to enable conservation and management to be carried out in ways that safeguard the intrinsic archaeological, architectural, historical, physical and cultural significance of the heritage”. The question is whether the “good stewardship” sought by the SHEP can be achieved without appropriately qualified staff?

14. The “Survey of LA Policies, Staffing and Resources for the Historic Environment in Scotland” (Arup, 2009 – but of December 2007 survey) indicated that 9 authorities (26%) had fewer than 1.0 FTE dealing with Heritage project and policy matters. Given the broader economic climate the situation is likely to only get worse. In the absence of any specific legislative duty to use such expert skills and advice it is envisaged that this will be an area of pressure. How can “informed decisions” (SHEP 1.30) be taken without using and taking advice from skilled staff? There is also, as experience elsewhere has shown, an increased risk of “maladministration” if relevant skills are not available or used. However this concept of an
“implied duty” to use and take advice from skilled staff is long standing. There is considered to be scope for sharing such expertise across administrative boundaries to minimise any additional burden.

Retaining the value of the heritage asset
15. Currently there are – despite the frequent public perception – no direct requirements on the owners of Heritage assets to maintain these assets. Para 1.40 of the SHEP does refer to “the long-established policy that all government departments should discharge properly their duty of care for heritage assets and the SHEP generally emphasises the important role of “good stewardship” (1.33) and “informed decision making” (1.30). Frequently however older buildings are seen as a problem that can best be addressed by neglecting and flattening the site – so as to minimise maintenance and security costs, or a lever to try and secure further enabling development. The related blight does little to secure the outcomes and objectives set out in para 6 and 7 above – where such heritage buildings usually make an important contribution to local character and identity.

16. The case for extending VAT reduction (beyond the current limited remit) and encouraging buildings to remain in use (e.g. through limiting Council Tax exemptions) has long been made. The lack of a “duty of care” on all owners remains a concern. Indeed, notwithstanding Chapters 1 and 4 of the SHEP, it is understood that related NHS Guidance or Asset Management Plan (AMP) guidance still needs to be aligned to promote the “good stewardship” identified in the SHEP. The HS Managing Change Series could usefully strengthen the sustainability and financial cases for retaining and reusing older buildings.

17. Two other points have been raised regarding listing—
   • Concerns regarding s.18 “certificates of immunity”. Experience elsewhere suggests this is unlikely to be an issue. This has to be seen in the context of the existing way in which HS decline to consider listing when there is a live planning application (or in practice, a live building standards application). It can be useful at pre-app stage to have the “special interest” of a heritage asset assessed independently. It is not considered that such a request should be limited to the owner- but it should ensure that there is protection afforded to the heritage asset during the evaluation of its special interest (a point not addressed in s.18). A requirement for HS to regularly review the statutory list for each area (say every 10 years) would further minimise the need for such certificates.
   • The ecclesiastical exemption from the legislation for LB in use. A move to bring all historic places of worship within the listed building management system would closely fit the modernising planning agenda by simplifying the exceptions. The increasing disposal of such heritage assets adds merit to this aspect. Experience suggests there is scope to improve the current position on in-house assessment of ecclesiastical works.
Assessing and limiting the risk of any action

18. The actual use of listed building enforcement notices (s.34), or urgent works (s.49) or repair notices (s.43) (using Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997) is understood to be very limited. Usually action under the Building (Scotland) Standards Act 2003 – either a defective building notice under s.28 or a dangerous building notice under s.30 (amended to indicate that demolition is not an immediate option for a listed building) or even an amenity notice (s. 179) of the Town and Country Planning (Scotland) Act 1997) – will be faster and more easily served.

19. In part this ease is considered to arise from their more frequent usage and the safety aspect and related budget. However there may be a number of other issues that limit the use of the legislation—

- the potential legal challenges – particularly the need for the works to be “the minimum necessary for the preservation of the building”. This has occasionally led to minimum works which do not “preserve in a cost effective way” or limit the deterioration of the listed building.
- the potential for a compensation notice to be served in return (again – virtually unused in practice so far as I am aware) – leading Council’s to be very cautious.
- the lack of any budget for such one-off works. A HS central “revolving grant fund” could assist.
- the complexities of moving through the use of a repairs notice and subsequent CPO, and the complexities of “back-to-back” agreement with a 3rd party – in an era of procurement and disposal regulations. It may however be noted that the Disposal of Land by Local Authorities (Scotland) Regulations 2010 (SSI 2010/160) will be beneficial in recognising that disposal of land at a “less than best” consideration can be appropriate when it is associated with the promotion or improvement of economic development, regeneration, health, and social or environmental well-being. It would have further assisted if heritage assets had been identified as an appropriate circumstance.

20. The Bill helpfully allows urgent works liability to be registered (s.25) which helps address the situation where the owner tries to evade liability by moving ownership between different “paper companies”. However the Glasgow Council suggestion of removing the 5 year limit (s.50B (1)(c)) is supported – as it is otherwise likely to encourage owners to procrastinate to try and avoid repaying any costs.
Unauthorised works to heritage assets

21. The benefits of using a skilled conservation agent and pre-application discussions are fairly obvious. However many listed building applications take longer to be processed because of the inadequate details submitted with the application. A “validation checklist” for work to heritage assets – perhaps as part of the Managing Change series – would help ensure agents are aware of the level of detail required.

22. The positive role of Council’s to help and advise owners at pre-app stage should not be under estimated. Neither should the growing number of applicants who wilfully and deliberately bypass the due process. That is why the time limits on enforcement action need to be addressed – not just for heritage assets – but also to maintain the wider credibility of the planning system. Equally the suggested extension of time limits – to 5 years for declining to determine an application (s.20 – currently two years) is supported.

23. The alignment of listed building enforcement procedures, as well as stop notice and temporary stop notice procedures (s.41) with those of the planning processes is welcomed. Equally the proposed fixed penalty notices (s.24) are a welcome addition.

24. In passing it is worth noting that the lack of digital map definition of the curtilage of the heritage asset does not assist the move to e-planning. The Bill fails to either set out and define the case law tests or to set a long term objective to define on a map the extent of the heritage asset to be protected.

25. The Bill also omits to take the opportunity to both simplify and strengthen the legislation relating to development in conservation areas. The public expectations to control the cumulative impact of minor changes on the overall character of conservation areas are hindered by the cumbersome Article 4 process. Simplifying the complex permitted development regulations and GDO is understood to be under discussion. In conservation areas a simple “visibility from a public route or footpath?” test might allow the administrative burden to be reduced and facilitate an easier understanding of the legislation.

Conclusion

26. As previously stated, HoPS is supportive of the general principles of the Bill and welcomes the approach to tidy up and align the approaches to unauthorised works and to enforcement. The consultation and involvement prior to tabling the Bill has helped address some concerns.

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