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Legislative Context & Powers

1 Introduction

The current laws and regulations surrounding day to day issues of buildings at risk, as with much of the provisions for the historic environment, lie within the area of Town and Country Planning legislation including, principally:

- The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 with modifications by The Historic Environment (Amendment) (Scotland) Act 2011;
- The Town and Country Planning (Scotland) Act 1997;
- The Town and Country Planning (General Development Procedure) (Scotland) Order 1992 SSI 1992/224. From 3 August 2009 revoked (with savings) by the Town and Country Planning (Development Management Procedure)(Scotland) Regulations 2008/432;
- The Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Scotland) Regulations 1987 (SSI 1987/1529); and
- The Planning Etc. (Scotland) Act 2006.

The current statutory protection of the historic environment¹ is a continuation of that introduced by the Town and Country Planning (Scotland) Act 1972 (which was subsequently substituted by The Housing and Planning Act 1986) although the modern planning system had its foundation in the Town and Country Planning (Scotland) Act 1947:

An Act to make fresh provision with respect to Scotland for planning the development and use of land, for the grant of permission to develop land and for other powers of control over the use of land; to confer on public authorities additional powers in respect of the acquisition and development of land for planning and other purposes, and to amend the law relating to compensation in respect of the compulsory acquisition of land; to provide for payments out of central funds in respect of depreciation occasioned by planning restrictions; to secure the recovery for the benefit of the community of development charges in respect of certain new development; to provide for the payment of grants out of central funds in respect of expenses of local planning authorities in connection with the matters aforesaid; and for purposes connected with the matters aforesaid.

¹ The provisions for scheduled monuments and archaeological matters are contained in other Acts not directly relevant if the conventional definition limiting 'building at risk' to any listed building or building in a conservation area is applied.

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The most fundamental provision of the 1947 legislation was to establish that planning permission was required for development; ownership alone no longer conferred the right to develop the land. To control this, the Act required planning authorities to prepare a comprehensive Development Plan. Councils were given wide-ranging powers in addition to approval of planning proposals including the ability to carry out redevelopment of land and to use compulsory purchase orders to buy land and lease it to private developers. There were powers to control outdoor advertising, to preserve woodland and also for the recognition of buildings of architectural or historic interest. Provisions were included for the acquisition of such buildings where reasonable steps were not being taken for their proper preservation.

The introduction and of legislative protection was, in large part, a reaction to considerable loss of historic fabric in the first half of the twentieth century, the comprehensive redevelopment of the post war period and a general growing interest in keeping that which was precious from the past. Over the forty or so years since the 1972 Act, concepts such as the listing of buildings of special architectural or historic interest, the need for listed building consent for works which might affect their character and the presumption in favour of their retention and preservation of conservation areas have come to be commonly understood and accepted as everyday parts of modern life and behaviour. Looking back from today, it is clear that without such provisions there would undoubtedly be considerable detriment to Scotland's places, quality of life, history, culture, tourist potential and identity. Over this period Scotland has developed expertise in looking after its heritage and in managing change to maintain essential character and while bringing life to old structures using designs that complement rather than detract from their essential qualities.

The Planning (Listed Buildings and Conservation Areas) Act 1997 saw the separation of built heritage from the mainstream planning considerations continued in the Planning (Scotland) Act 1997 while keeping it firmly within the sphere of Town and Country Planning within which it had developed. This may have reinforced views of conservation of the historic environment as a specialist area rather than a mainstream planning consideration and in some eyes may have distanced listed building matters from the core considerations of public authorities. As a consequence, buildings at risk issues are sometimes seen as the peripheral concern of the conservation specialist with the result that other legislative powers that might have a bearing on the built fabric of our historic buildings and areas have been under recognised and utilised. These include mainstream planning powers for safeguarding amenity, legislation around public safety, defective and dangerous buildings, provisions for ensuring the adequate nature of the housing stock and other miscellaneous civic provisions to ensure quality of the living environment and places.

Each of these powers has a place in the Toolkit and it is hoped that local authorities and others who benefit from their services will come to recognise their potential in developing solutions for buildings at risk. Proactive efforts should therefore involve not only those concerned with planning and conservation but also those with other relevant responsibilities and powers to ensure that the legislation can be used creatively and in concert. The development of property asset management planning, buildings at risk working groups and other strategic approaches to buildings at risk within some local authorities are clearly positive steps. A co-ordinated approach also allows protection of the historic environment, including the protection of buildings at risk, to embrace and merge with current considerations for community empowerment, best value, sustainability, energy conservation and regeneration.

2 The Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997

This Act covers a number of matters of direct relevance to addressing buildings at risk including, most notably:

Sections 49 and 50 The Urgent Works Notice

Powers enabling the undertaking of minimum urgent works required for the preservation of an unoccupied building or unoccupied part of a listed building (or unoccupied building in a conservation area). These are normally, but not exclusively, works designed to keep a building watertight, to provide necessary structural support in cases of potential danger or to prevent damage by vandals. This is covered in detail in Toolkit text *12 The Urgent Works Notice*.

Sections 42, 43, 54 and 55 The Repairs Notice and Compulsory Acquisition

Empowering the compulsory acquisition of listed buildings that are not being properly conserved following the prior service of a notice specifying works considered reasonably necessary. This is covered in Toolkit texts *13 The Repairs Notice* and *16 The Compulsory Acquisition of Buildings at Risk*.

Sections 6, 8, 34 and 35 Unauthorised Works to a Listed Building

This enables action by the planning authority where unauthorised works to a listed building have been undertaken. It is an offence to execute or cause to be executed any unauthorised works either for the demolition of a listed building or for its alteration or extension in a way which would affect its character. Also, failure to comply with the terms of a conditional grant of listed building consent or to comply with a Listed Building Enforcement Notice is also an offence. In these cases, an offender found guilty is liable on summary conviction to imprisonment and/or a fine not exceeding the statutory maximum or on conviction on indictment to imprisonment and/or an unlimited fine.

It is not uncommon to find that buildings at risk, especially those that are vacant or abandoned, have been subject to unauthorised works. It would be highly remiss of a local authority to ignore this, particularly when pursuing an initiative to ensure the proper preservation and ultimately the sustainable re-use of the property. Enforcement powers are discretionary and in adopting enforcement strategies that prioritise the scale and types of cases that will be pursued most local authorities do give due attention to unauthorised works to listed buildings. Enforcement of unauthorised works in parallel with Urgent Works or Repairs Notices can stress that a council is seriously concerned about a particular case and can place the local authority in an enhanced negotiating situation. The service of a Planning Contravention Notice can help the authority gain valuable information regarding the building and its owner.

In taking listed building enforcement action it is important that that appropriately qualified and experienced conservation officers or advisers as well as enforcement staff are involved in inspection, evidence gathering and assessing the affect of the works on the character of a listed building. It is also crucial that all evidence, including photographs are corroborated by an appropriate witness and that record notes are made of all site inspections and meetings with owners, occupiers and operatives. Officers can also take statements from witnesses that can be produced, along with the other evidence, in court at a later date.

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The Historic Environment (Amendment) (Scotland) Act 2011 amended the Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) Act 1997 Act relating to listed building enforcement notices. This allows a listed building enforcement notice to specify any works which the planning authority or the Scottish Ministers require to cease and/or to specify steps which must be taken, and makes the necessary amendments following on from this to the enforcement process.² The Act gives local authorities and Scottish Ministers the power to serve stop notices and local authorities the power to issue temporary stop notices in relation to unauthorised works on a listed building. Where a stop notice has been served on a person, it is an offence for that person to contravene, or to cause or permit the contravention of the stop notice. Similarly, where a site notice has been displayed in respect of a stop notice, it is an offence for anyone to contravene, or to cause or permit the contravention of the stop notice.

Also, section 39A of the 1997 Act, as inserted by section 24 of the 2011 Act, provides planning authorities with the power to issue fixed penalty notices as an alternative to prosecution in cases where a person is in breach of a listed building enforcement notice. The notices are an option for the planning authority. The person receiving such a notice also has an option whether to pay or not. If they pay within the relevant time period then the person cannot be prosecuted for an offence under section 39 of the 1997 Act as respects the breach of the listed building enforcement notice.

Section 53 Damage to a Listed Building

Any person who damages, or allows damage to be done to, a listed building is guilty of an offence and liable on summary conviction to a fine. If thereafter, such a person fails to take reasonable steps to prevent damage, or additional damage resulting from the first offence, they are guilty of a further offence and liable on summary conviction to a fine.

Where a planning authority becomes aware that works have been undertaken to a listed building without consent, or that conditions imposed upon a consent granted have not been complied with, it may refer the case to the procurator fiscal with a view to prosecution and/or issue a listed building enforcement notice requiring rectification of the damage done. In most cases of unauthorised alterations or extensions an enforcement notice issued locally is probably the best way to achieve a practical improvement in the building's condition. Prosecution for unauthorised works is generally confined to cases where the works done are particularly blatant or so radical that improvement is hardly feasible. Listed building enforcement notices are served on the owner, lessee and occupier of a building to which the unauthorised works have been carried out and on any other party with an interest in the building. Notices must be served on the current owner, lessee and occupier, even if the property has changed hands since the unauthorised works were carried out.

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

- The steps required to restore the building to its former state;
- The steps required to alleviate the effects of work executed without listed building consent; and

² See *Listed Building Enforcement: Stop Notices, Temporary Stop Notices and Fixed Penalty Notices Guidance Note* accessible at <http://www.historic-scotland.gov.uk/listed-building-enforcement.pdf>

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

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

A notice requiring the alleviation of works executed can only be issued if the planning authority is content that complete restoration is either impracticable or undesirable. There are occasions when the appearance of a building can be improved by the planning authority requiring something less than complete reinstatement. It may, for example, be undesirable to require the reinstatement of outbuildings or later additions to a building which are not in keeping with the original structure. Planning authorities should note, however, that the steps specified in the notice must be limited to steps required to minimise the effect of unauthorised works, or works required to restore a building to its original condition prior to the unauthorised works being carried out.

An enforcement notice cannot seek to achieve improvements unrelated to works carried out without consent. Listed building consent is deemed to be granted for works of alleviation specified in an enforcement notice.

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

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

Failure on the part of the person responsible for the contravention to comply with the terms of a listed building enforcement notice within the time specified constitutes an offence leading on summary conviction to a fine, or on conviction on indictment to an unlimited fine.

The planning authority is also empowered, if the steps required by a listed building enforcement notice have not been taken within the time allowed, to enter on to the land and take those steps. They can then recover from the owner or lessee of the land any expenses reasonably incurred in doing so.

Section 56 Demolition of Council Property

Where a local authority serves a notice, makes an order or proposes to take action requiring 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, notice, which in such cases may initially be oral, should be given as soon as possible before the works commence.

Section 76 Rights of Entry

This authorises council or Scottish Ministers' representatives to enter land in connection with the preparation and serving of notices, to check whether it is subject to unauthorised works or damage and whether the building is being maintained in a proper state of repair.

3 The Town and Country Planning (Scotland) Act 1997

This wide-ranging general planning statute also contains a number of powers of relevance to buildings at risk.

Section 179 The Amenity Notice

This empowers a planning authority to serve a notice requiring steps be taken to tidy a site (including unsightly buildings at risk) when it is considered by the authority that the amenity of the land is being adversely affected by the condition of neighbouring land. This is covered in detail in the Toolkit text *14 The Amenity Notice*.

Section 189 Compulsory Purchase

This allows for the compulsory acquisition of property (including buildings at risk) suitable and required for development, redevelopment or improvement or required for a purpose the interests of the proper planning of an area in which the property is situated. See Toolkit text *16 Compulsory Acquisition of Buildings at Risk*.

Section 156 Rights to Enter Land

A power that enables planning authorities to authorise a person to enter land, at a reasonable hour, for any of the following purposes:

- To ascertain whether there is, or has been, any breach of planning control on the land, or on any other land;
- To determine whether any of the planning authority's enforcement powers should be exercised in relation to the land, or any other land;
- To determine how any such power should be exercised; and,
- To ascertain whether there has been compliance with any requirement arising from earlier enforcement action in relation to the land, or any other land.

This is covered in detail in Annex E of Planning Circular 10/2009: Planning Enforcement.³

4 Other Powers

There are also a number of other legal provisions outwith the Planning Acts that can be of use in buildings at risk cases.

The Buildings (Scotland) Act 2003 deals with the compliance of building regulations and associated technical standards and provides enforcement duties to ensure that public safety is maintained in relation to defective and dangerous buildings. This is considered in the Toolkit text *15 Dangerous Buildings and Demolition*.

The Housing (Scotland) Act 1987 includes provisions for the acquisition of land or property (including derelict buildings) for the provision of housing. See Toolkit text *16 Compulsory Acquisition of Buildings at Risk*. The Housing (Scotland) Act 2006 has provisions for the compulsory improvement of houses, powers to secure repair of house in serious disrepair and the general duty of local authority in respect of houses not meeting tolerable standard.

³ <http://www.scotland.gov.uk/Publications/2009/09/16092848/6>

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Law on statutory nuisances and its enforcement and the concerns of The Environmental Protection Act 1990 and The Public Health etc. (Scotland) Act 2008.

The Civic Government (Scotland) Act 1982 contains local authority powers in relation to buildings in need of repair, the cleaning and painting of common areas, maintenance of private open spaces, protection of insecure premises and for maintenance of statues and monuments.

In addition, there are provisions relating to building defects within The Tenements (Scotland) Act 2004 and The Title Conditions (Scotland) Act 2003.

On 6 November 2013 the Minister for Local Government and Planning launched a consultation on detailed proposals for the Community Empowerment (Scotland) Bill which is likely to lead to new provisions that might apply to buildings at risk. The consultation covers the draft Bill and detailed policy proposals which include measures intended to:

- Strengthen joint working and accountability in Community Planning Partnerships;
- Strengthen community voices in shaping and delivering outcomes;
- Make it easier for communities to take on public sector assets;
- Streamline the community right to buy;
- Bring clarity to the common good and allotments; and
- Make it easier for local authorities to recover costs in respect of dangerous and defective buildings.

The draft Bill and detailed policy proposals have been shaped by earlier consultation responses. See Toolkit text *10 Community Asset Transfer*.

Section 17 of the Crime & Disorder Act 1998 has been used by local authorities in England and Wales in relation to unauthorised works relating to buildings at risk but this provision does not apply to Scotland. Under the Act it is the duty of each authority to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent, crime and disorder in its area.

The above guidance was prepared by The Architectural Heritage Fund for Historic Scotland and is published by the Buildings at Risk Register for Scotland as part of the Buildings at Risk Toolkit. <http://www.buildingsatrisk.org.uk/>

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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