

## **IMPROVING LISTED BUILDING CONSENT**

### **Response to the DCMS consultation of July 2012**

**by *Green Balance***



Green Balance is a small planning and environment consultancy with wide ranging interests in national policy and its local application. This includes heritage as well as housing, minerals, rural development and planning procedures & practices. This year we have prepared reports for English Heritage on current issues and opportunities facing local authority-owned heritage assets and on English Heritage's involvement in Environmental Impact Assessment.

#### Key general points

- 1) Reducing administrative burdens on the parties concerned with Listed Building Consent (LBC) is a desirable objective, subject to the provision – as intended – that heritage assets are conserved in a manner appropriate to their significance. However, this is difficult to achieve, and especially so without the law of unintended consequences taking effect. Furthermore, we are not convinced that the evidence shows that the existing system of LBC is so onerous that it requires change on the scale contemplated in this consultation. It would be quite wrong to believe that applications to alter listed buildings which receive consent are in some way unnecessary in principle. As with ordinary planning applications there are many more approvals than refusals, as the system aims to achieve good development as well as stop bad development. Furthermore, it is only the need to submit a proposal in advance, to secure consent, which ensures that high standards of management of listed buildings are sustained. A far more casual approach to the listed heritage can be adopted where authorisation of works is not required in advance.
- 2) The intention across the consultation options that this will have the consequence of allowing public agencies to focus their staff instead on the highest risk areas and deliver a more efficient service is purely aspirational and not supported by evidence. The far greater likelihood is that yet more staff working in heritage conservation will lose their jobs (under options (1), (2) and (4)). This is because most local authority heritage teams, where they exist at all, are already confining their activities to statutorily required work: if the statutory requirements are reduced the posts will gradually disappear rather than staff be redeployed to other valuable heritage work.
- 3) The consultation assumes that works carried out under the revised arrangements will be lawful. This can by no means be assured, especially under option (2) (local and national class consents). The absence of prior scrutiny will encourage a climate of 'trying it

on' amongst less heritage-minded owners and developers. It is far less time-consuming for staff to review proposed alterations to listed buildings in advance at the LBC stage than to investigate after the change whether or not there has been a breach of control and, if so, pursue its rectification. In any event, enforcement is not a statutory duty, so the likelihood is that insufficient staff will be available for this and the objective of conserving heritage assets will not be achieved.

4) The time and effort involved in setting up the new arrangements can be expected in at least some cases easily to eclipse the time saved later (in not needing to handle so many LBC applications). This applies especially to options (2) and (3). These proposals in effect will apply the equivalent of the General Permitted Development Order to listed buildings. Some changes may be deemed acceptable if they are subject to conditions about how they are carried out, so there will be a need to review not only what can be done without an LBC application but how it is done. Establishing this will be onerous on all parties. This can be expected to increase the burden of enforcement requirements noted under point (3) above.

5) The proposals reduce the margin for error in the changes allowable to listed buildings (especially options (1) and (2)). The boundary between individual proposals which will be considered by a conservation officer and those which will not would be shifted in favour of not doing so. Quite simply this increases the risk that undesirable or even wholly unacceptable proposals will slip through the regulatory system and become lawful. While all options would reduce the margin for error (other than a basic-only application of option (3)), the most obvious example of major risk is under option (1) (prior notification). Here, if local authority staff miss a proposal then it is deemed to be permitted, possibly with dreadful permanent consequences for the heritage. Wily applicants are adept at submitting proposals either at busy periods or when staff are more likely to be on holiday (August and late December), to increase the chance of schemes slipping through. The solution to this – automatically asking for all cases to be subject to full LBC – negates the purpose of the change in the law. Furthermore, relaxations of control of this sort are a slippery slope: some parties are never satisfied that enough has been done to 'reduce bureaucracy', and pursue further relaxations even on the most flimsy of evidence. The numerous reviews of the Use Classes Order in recent years, always with this in mind, illustrate the risk.

It is also important to appreciate that continual cutbacks in local government and the low priority afforded to heritage issues in most authorities has already severely increased the margin for error in the handling of LBC applications. In many authorities, staff (or their contracted service providers) have insufficient time to make site visits before deciding applications – i.e. they work from the plans provided alone – and aspects of listed building control have already effectively been downgraded in some places (e.g. in relation to the handling of curtilage and more generally by the employment of insufficiently experienced and skilled staff to do the job as well as might be hoped). In other words the 'lighter touch' aspired to in the consultation is already happening, and there is a very present risk that further reduction in the attention afforded to listed buildings will result in real damage to the heritage.

6) Heritage expertise as a whole will be lost to the nation as a result of the proposed changes. All four options, if they were successful in the way the consultation intends,

reduce the need for local authority conservation staff (though option (3) is most unlikely to be successful in that way). As indicated above, such posts will generally cease to exist. In the case of option (4) (accredited agents) there might be the alternative creation of posts in the private sector, but the likelihood of these being taken by redundant local authority staff is small. More likely is that existing private sector suppliers will become accredited agents as a sideline. Paragraph 1.11 encourages the idea that the professional agents of applicants can also be the independent arbitrators of those very same schemes. This would be unacceptable: promoters cannot also be regulators, bypassing democratic accountability. There is an obvious risk to the credibility of the system if any accredited agent also works in the private sector: at the very least there is a need for some kind of firewall between the roles so that they cannot be confused (comparable to the role of consultant planning inspectors contracted by the Planning Inspectorate). The fear will be that recommendations of approvals will be motivated either by an inherent sympathy with owners' desires (that differs from local authority regulators' desires), or by a hope to generate future work for themselves in the private sector. Even if those are unfounded fears, the fears themselves will be real and could destabilise the arrangements.

7. We conclude that Option 3 is the only change which should be considered. This could assist the more effective identification of the margin between what does and does not require LBC. Even so, this option runs the risk of the 'slippery slope' argument mentioned in point (5) above, as it could easily be extended in due course to classes of listed buildings or to relax controls over matters of real substance rather than just define de minimis alterations to listed buildings. Furthermore, the effort for local authorities in identifying listed building by listed building the works to it which would be lawful without the need for LBC would far eclipse the effort in dealing with any LBC application or any preliminary request for advice on the need for one. In other words, this simply would not be worth the bother in the public sector, though it would be of merit for owners. (Owners too would save little effort as they would have to be sufficiently clear about the extent of changes they had in mind in order to elicit a proper response).

#### Responses to specific questions

These responses expand upon rather than repeat key points already made.

Q1. No. Prior notification is far too high a risk option. Deemed consent could result in damaging changes to listed buildings becoming lawful if local authority staff failed to act effectively within the notification period or if they initially misunderstood the impacts of the proposals. Furthermore, in most cases the benefits to owners would be modest: justification for any harm to a listed building will still be required, and in cases where the heritage is at greater risk – and therefore full LBC applications required – the owner will have achieved little other than an extra round of correspondence and 28 days delay. If the objective is limited to marginal cases (i.e. whether or not LBC is required), then we consider Option 3 would be better. However, more effective and meaningful pre-application discussion would be still better – at least in those authorities which have sufficient competent staff to be able to provide the advice desired by applicants.

Q3. No. A voluntary system of local and national class consents would be particularly foolhardy. Paragraph 4.5 of the consultation begins to scratch the surface of the practical problems of establishing permitted development rights in the first place, along with back-up mechanisms like call-ins (and thus a delaying mechanism that allowed time for the Secretary of State to decide whether or not a call-in was appropriate), all of which eat away at any alleged benefits of the approach. Doing so locally too – in recognition of the local characteristics that listed buildings enshrine – simply adds a further tier of enormous bureaucratic endeavour to establish the system in the first place, before a single LBC application is avoided.

Then paragraph 4.6 realises that consultation would be required, then notification of those affected. The result would be huge variety of controls around the country rather than a single national system of widely understood regulation. Owners wanting to make changes to their listed buildings (or their agents) would continually pester conservation staff to find out what the law was locally, and in the face of inadequate evidence about the proposals conservation staff might find it easiest to encourage proposals to be submitted formally to before giving a formal opinion. The reference to Article 4 Directions illustrates just how easily the system could become bureaucratic, damaging to the heritage, and far more effort than the current system.

Class consents would not be heritage-neutral. Local authorities with little interest in heritage would find themselves with powers to give even less weight to heritage assets by granting more widespread class consents. How convenient it would be to get rid of conservation staff if only some wider class consents were granted!

Q5. Neither option 1 nor option 2 is acceptable. Both threaten the heritage and neither would produce much net bureaucratic benefit.

Q6. These proposals for Certificates of Lawful Works would be acceptable provided they are limited, as apparently proposed, to establishing for any individual listed building the works which would be outside the scope of listed building control – i.e. clarifying the extent of the existing law. That is not a relaxation of control but an exposition of the law. There is no reason why that should not extend to works already carried out: either they were lawful or they were not, and that can usefully be established.

There are, however, some shortcomings. First, as explained in point (7) above, we do not think the merit worth the enormous effort in the public sector. This would not be a saving of bureaucracy but an improvement in the accuracy of application of the established law. Second, there would need to be conditions and break clauses, e.g. to address features revealed in the course of alterations, all adding to the burden or reducing the benefit. Third, we think a superior approach would simply be a law requiring a formal response if an owner were to ask the local authority for a statement on whether LBC is needed for a particular alteration. Like Certificates of Lawful Works, this too would oblige local authorities to employ sufficient staff competent to answer such questions of legality, and that would tend to boost the employment prospects for qualified conservation staff in local government.

Q8. No. Accredited independent agents will not only raise issues of potential conflicts of interest (see point (6) above) but also produce far less benefit to local authority bureaucracy than the consultation imagines. The consultation acknowledges that the costs to owners would rise rather than fall. The additional overall bureaucracy will arise within local government. This is because the information to be put in front of councillors will be partly from accredited agents and partly from consultees. Councillors will rightly expect some kind of assessment of the overall balance of advantage before making decisions. An officer report would also obviously be needed for a delegated decision. That means there will continue to be a need for local authority staff, who will now be assessing the work of accredited agents rather than simply doing it themselves (as well as assessing consultees' views). That is a recipe for duplication rather than the saving of time and effort. The work of local authority conservation officers would not be 'replaced' as the title of the option suggests.

Q10. Heritage accreditation schemes will not solve problems of attitude. Many consultants advising heritage owners already have professional qualifications, and that does not stop them doing the best for their clients rather than doing the best for the heritage. The need is for transparent and verifiable demarcation between the roles of consultant adviser and independent accredited agent.

Q11. No (see point (6) above).

Qs 12-14. These matters are to some extent addressed in respect of local authorities' own heritage properties by our 2012 report for English Heritage and the Heritage Lottery Fund, awaiting publication, on *Local Authority Heritage Assets: Current Issues and Opportunities*.

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