ENGLISH HERITAGE

Penfold Reforms and the Enterprise and Regulatory Reform Bill

Notes of Sectoral Discussion 3

English Heritage Offices
16 August 2012 2pm

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 afternoon of the 16th of August chose 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: listingconsultation@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/

The reason Government is keen to bring these changes in is because it is tied into the Growth Agenda. Opportunities for legislative change do not come around very often so we must make the most of this one. It was emphasised that the intention of DCMS is to see no reduction in protection.

The 'previous engagement' which has justified the short consultation period was what happened after publication of Penfold Implementation Report: EH consulted widely with the sector, in quite a lot of depth, on the proposed improvements suggested by Penfold and how they might be implemented. Some of the new ideas from earlier consultation exercises are what has come forward now – evidence that Government is taking feedback seriously.

The hope is to balance out the short consultation period with wide engagement – these events are the lynchpin of this. The Minister has himself asked to see a synthesis of the feedback from these sessions.

Already in the ERR Bill are changes which have been tried, tested and consulted on since the days of the Heritage Protection Reform Bill.

- New list descriptions clearly articulating features which are 'not of interest '
- Certificates of Immunity (COI) from Listing for non-owners
- Removing the requirement for Conservation Area consent for demolition
- Giving statutory force to HPAs

These extra proposals being consulted on now are not the Bill yet. Despite the apparent speed of insertion, the parliamentary system will ensure that these proposals will be scrutinised and if they are found wanting, they will not go through.

DISCUSSION:

On participant pointed out that the Government's new Consultation Principles say that the timescale should have regard to the ability of those being consulted to respond. This was articulated by the RTPI in their letter to the Minister on Aug 9th. The response to that letter is not yet known.

LPAs who are who are responding to this consultation are, due to the timescales, unlikely to have had their responses ratified by elected members. Anyone for whom this is the case should be sure to mention this in their consultation response.

Duncan McCallum, Director of Government Advice said of EH's position: 'We have no opinion in favour or against as yet. We are strictly neutral until the time we make a formal statement, which is currently in the process of being approved internally.' The English Heritage position will be made public after the consultation closes.

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

DISCUSSION:

What about the scope to appeal for non determination – DCMS has not mentioned it in the consultation documents - so how would the appeal processes work?

The effect of 'deeming' something is not meant to stop the LPA from doing the thinking. Safeguards would be needed. LPA would need to have a positive obligation to respond – omission should not be assumed to be deemed consent. LPAs should be obliged to send out a decision.

<u>Resourcing issues</u>

What would happen in LPAs where there is only one person looking at LBCs with no one to delegate to? What if they were on leave or the post was vacant or some other such eventuality?

Expertise & Bureaucracy

A lot of the problems which are perceived may be a result of the lack of expertise in the sector. Sadly that's not going to be fixed overnight – what can we do in regulatory terms to fix it? This proposed option does not require the LPA to have the expertise to make this decision – quite the contrary: It forces a decision out of the LPAs but it would not be necessarily a sound one…

Confident conservation officers already deal with the issue of whether or not something needs LBC by phone or email or exchange of letters. It's the unconfident or under-resourced LPAs who ask for PreApp or full LBC. This option would formalise a process that already exists in so far only as it relates to works that do not affect the character of the building.

Someone asked whether this wouldn't exacerbate the gap between LPAs with existing, confident conservation officers and those LPAs which are struggling. It was suggested that this option would most likely add another layer of bureaucracy to those LPAs who need it the least: An unconfident LPA, or one with a vacuum of conservation expertise would simply wait 27 days before looking at an application, then default to 'no' and ask for full LBC, in practice, thereby extending the LBC process by another 28 days.

How widespread is this 'precautionary paralysis' of asking for LBC when it is not necessarily needed? DCMS are keen to see any quantitative evidence of this.

Lack of Democratic Processes

It was noted that restricting the process to 28 days or removing the consultation aspect altogether would reduce the democratic input. Under normal LBC, consultation takes place. With a 28 day turnaround, this would be challenging if not impossible. Even 6 weeks for Trees in Conservation areas is difficult for many local and parish bodies to respond to.

In order for this to work, therefore, the category of works for which deemed consent would be applicable would have to be very low risk and probably not get public consultation. But it was then pointed out that people object to plenty of applications which are ostensibly low risk. 'In planning, there is nothing so complicated as a simple application'. There was a concern that the deemed consent process would deny the public a right to comment on the change being made and this is undemocratic.

Quality of Information

Deemed consent suggests that works would otherwise be unlawful. This is not necessarily the case, provided the works are done in 'the right way'. The problem is that the 'right' sort of repairs don't need consent, the 'wrong' ones do, for example re-pointing a brick wall might require consent if it was carried out in a damaging way using an angle-grinder to cut out the original mortar. For a careful conservation officer to satisfy themselves that works could be given deemed consent, sufficient detail would have to be provided which might make the deemed consent process as onerous as LBC – increasing the burden on both applicants an LPA staff.

Someone pointed out that there was an inherent assumption in this Option that works that are cheaper or smaller are therefore less important or would result in less harm. How do you define 'low risk' - what would be the threshold? The implication in the consultation document is that 'lower risk' assets are less important – but they are still nationally important enough to have been designated.

There was also concern that deemed consent might be given accidentally – especially in an LPA where applications are validated - when they shouldn't be – by non-professionals.

Savings?

In admin terms, it is difficult to see how a deemed consent system would make any savings – the application would still have to be validated, processed and registered in system. It would only be

making life better for the applicant and then *only if* they had provided sufficient information for a decision to be possible. And if everyone acted cautiously and applied for deemed consent before submitting full LBC, this will actually mean an increased workload for conservation staff.

Someone also pointed out that from a consultant's perspective – they might try to drag the process out to garner more fees – first going for 'deemed consent' then perhaps for a Certificate of Lawful Works and then for full LBC. How is this in the interests of applicants?

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

DISCUSSION:

On a Local Level:
A local Class Consent could apply for a typology of building or an estate where a number of applications will come forward that will be acceptable every time. This option is to enable LPA to say, 'Don't come to me about X, Y and Z works. You can do what you like (with conditions)'. Obviously, it would have to have appropriate safeguards, and be in line with the NPPF, the LPA's policies and statutory considerations and also be subject to consultation and review.

This is envisaged as an enabling provision only – it would not oblige LPAs to do anything unless they wanted to. It's just a parallel to Local Development Orders or, in effect a Heritage Partnership Agreement that the LPA would undertake unilaterally with certain building owners.

One participant expressed concern that a system such as this might make things clearer for big developers or land-owners but that it would simply make an already convoluted system even more confusing for a typical applicant.

Despite this, there seemed to be a view that local class consents, provided the LPAs have the resources and the vision, could be a good thing. Someone pointed out, however, that there was a risk of neighbouring LPAs who didn't have these consents feeling the pressure to do the same thing when they might not want to (or be able to). It was also pointed out that this is already the case for some Article 4 directions in Conservation Areas.

Also, is it right that LPAs should have different standards of consent on things which are ostensibly considered to be nationally important? Why should the rules be different for two buildings of equal grade merely because of a boundary?

Someone speculated about how this sort of arrangement would be paid for. If it was proposed by someone other than the LPA, would they pay a fee or would Government impose an obligation on an LPA to consider local class consents in the same way as they consider conservation area designation. In reality, is it unlikely to happen unless the LPA can see tangible savings coming out of it.

Also, consultation notification in LBC cases is already fairly tricky. Who, if anyone would be notified with class consents?

Lastly, in the long-term, how could an LPA remain assured that the cumulative impact of consented changed didn't actually amount to harm?

On a National Level
There are three ways it is envisaged a national form of class consent could work:

1. One formula for all buildings – ie – all listed buildings or all buildings of a certain type can have as specified class of works carried out on them without the need for LBC.

Many felt that the reason it is not possible to have a general permitted development order on listed buildings is because they are all so different. This would be attempting to use a blunt instrument when a fine-toothed comb is required. None of the particpants was able to come up with any kind of work which could be done to all listed buildings or a significant category without the need at some point, in some cases, for consent, apart from changing the interior of phone boxes…

2. Exemption of particular bodies which meant they would not have to apply for LBC any more. In effect an extension of Ecclesiastical Exemption (EE). This is based on the assumption that Government would require that the bodies in question would have internal systems of control which are as good as the secular system. Could this work?

Views were expressed that EE was sometimes flawed and not always reliable and therefore this kind of thing might not work. It was acknowledged that from a developer's perspective (especially in the case of infrastructure projects which crossed many local boundaries), bypassing the LPAs would offer benefits.

3. Specified bodies to do specified works to specified buildings: eg 'The bodies in Schedule A can do the works in Schedule B to the buildings in Schedule C'. In effect this would be a large-scale cross-boundary heritage partnership agreement (HPA) that was agreed over the heads of the LPAs.

Whilst it was felt there might be some merit in a few of these agreements for national infrastructure, there was some wariness about this approach more generally because HPAs are resource-hungry and can be fraught with difficulty.

There's an issue of cumulative harm – lots of minor changes can amount to a great deal of harm. Formalising the process could also mean that the special cases (eg, where the bathroom fittings *should not* be removed) are more likely to slip through the cracks.

Someone also pointed out that lack of consultation and the bypassing of the LPA is not an approach that would sit well with the Localism agenda.

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

DISCUSSION:

Clarity

The purposed of a Certificate of Lawful Works (CLW) for proposed developments would be to provide the developer with some clarity about whether or not LBC was required. Many in the group agreed that they would not want to perpetuate a system where one cannot get confirmation about whether or not something needs LBC unless it's from a judge. CLW could be a 'no' if the LPA was simply unsure if the proposal affected the character of the building, which would give the LPA the right to ask for more information or request a full LBC application.

Would the advent for CLW and deemed consent just do away with the informal talks that are such an important mainstay of an LPA's conservation service?

Bureaucracy

Several participants felt that, like Option 1 this was the unnecessary creation of a new process. Also, if an LPA has to be absolutely certain that the works in question did not require LBC, could this really be done with the limited information it is envisaged would be required for a CLW? If not, and applying for

CLW became as onerous as applying for LBC – both for the applicant and the LPA - then why bother? There was a risk of double-handling for the LPA.

It was argued that the information requirements for CLW don't have to be heavy, provided that the LPA officer has the skills (if there is one) to make the judgement. In order for CLW not to be a mirror of LBC and bureaucratically the same, it needs to be faster. Giving the conservation officer the power to write a legally sound letter telling the applicant one way or the other would be the quickest and least bureaucratic way of dealing with this.

There was also suggestion that, like with Option 1, the unconfident conservation officer would ask for LBC for safety's sake rather than grant a CLW.

Given the processing involved, CLW might be workable for very large developers where there are very high values involved – but maybe not so much for the domestic owner. Some were unconvinced that the bureaucracy involved would necessarily present a saving - in either time or money - for the LPA.

Retrospective CLW

Some said that CLW would be useful from a conveyancing perspective. There was considerable concern with the idea of retrospective CLWs for various reasons, the main being that it would be difficult to prove a case where LBC would have been needed once the works were completed. Secondly, this would raise issues of enforcement for LPAs.

At the moment, a new LBC application is the only way of to make changes to an existing LBC. This can be extremely problematic when applicants are at a critical stage halfway through the works when they find the existing LBC cannot be fulfilled for some reason. A CLW may be a way of expediting the amendment process would be useful, but again, perhaps not retrospectively as it would give people too much licence to deviate from the approved plans.

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

DISCUSSION:

Two proposed variants for this option were discussed.

1. Accredited agents with a thorough understanding of the decisions LPAs have to make and how the LPAs must discharge their statutory duties and who make their reports explicitly for the purposes of assisting the LPA in the discharge of their functions. These agents, whilst appointed and paid by applicants, would give recommendations suggesting what the LPA's decision should be in regards to the application. There are precedents for this in the legal profession (where a solicitor's duty to the court overrides his duty to the person paying his bill) and in developer-funded building control.

How could the accreditation work? Would it be a generalist one (ie, 'Historic Buildings Consultant') or very specialised, meaning there would be lots of different categories?

What would be the effect of an accredited agents' report? Would the LPA just accept it or should it be critiqued by a conservation officer? If an accredited agent was contractually obliged to help the LPA make the decision, would there really be a need for two opinions? That being said, because of the huge differences in opinion around conservation issues, aren't two heads better than one?

2. Accredited Agents, paid by the applicants, who issue LBC on behalf of the LPA. Is this practicable? What kind of works would this arrangement be possible for? This process would probably involve no consultation. Would there also be an inescapable issue of bias because of who was paying the bills?

Bias
Many in the room expressed concern that a consultant is pressured by the market to deliver what his client wants. There was some scepticism expressed with the idea that a consultant could remain impartial and work in the best interests of the LPA whilst being paid by the applicant and attempting to keep them satisfied at the same time.

Also, decisions on the impact of changes to listed buildings can be very varied and seldom black and white. It's not easy to spot bias because of there is a specturm of possible judgments that are not so extraordinary as to be obviously wrong to the untrained eye.

The group agreed that this could potentially be workable in instances where conservation officers agreed with accredited agent's reports – so that they would not have to write their own detailed report. But it was generally agreed that an accredited agent is not a complete replacement for the impartial assessment of a conservation officer. Judgement and objectivity are very important – and this could not be guaranteed by the arrangement proposed in this option.

Accreditation:
This would need some accrediting organisation to step forward to set the process up. The standards would have to come through accreditation and they will have to be very different, more stringent and potentially much more rigorously enforced than those we have now. There would have to be measures to ensure accredited agents' independence as well.

It was suggested that liability insurance would be very high for accredited agents as was believed to be the case for building control consultants.

Supplanting Conservation Officers?
Someone pointed out that the presumption implicit in the options is that LPAs don't have the resources to do everything properly. That's where bringing in the consultants could work - if it was possible to get them to work on behalf of the LPA. One participant pointed out, however, that taken at face value, this option risked LPAs further reducing their conservation expertise with reliance placed on accredited consultants to provide the necessary input.

Someone else noted that if conservation staff are removed from LPAs, they will have even less ability to do anything else – like Conservation Area Appraisals or Local Listing, or tackling Heritage at Risk – all the work that local people particularly value.

Also, a situation could arise whereby the accredited agents would get the most interesting applications with complex heritage assets and the conservation officers are left with the standard proposals. Not only would this be very demoralising, but it would also inhibit even further conservation officers' opportunities at improving their expertise and developing professionally. It would also mean that the high-risk projects were those that were dealt with by this higher risk system. It would not, therefore, be releasing staff resources to work on the more taxing cases, but the less important cases instead.

False Economy?
Someone pointed out that an LBC case delivered by an accredited agent that did not recommend approval would be a rarity. In one way this would be good because the agents could deal with a lot of the negotiations that conservation officers currently have with applicants about their plans, but it might also mean that the LPA would, as a consequence, lose its PreApp revenue.

In a diligent LPA with an effective conservation service, officers will fact-check and scrutinise Accredited agents' research work – in effect doubling efforts.

One participant commented that the push to rely on one sole expert is very much a European approach to planning, whereas the tradition in England has been a more adversarial style upon which a

judgement is then made by an impartial body (in this case the LPA). Inserting one sole expert into the process without effective checks and balances is a recipe for disaster.

There did not appear to be support for this model. Agents were expected to act in a general way to support developers' proposals. Giving those agents more power in the decision-making process appeared to be a worrying prospect for a significant number in the room.

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 – there is 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
- Being able to carry out works on occupied buildings
- CPOs - Improving conditions for minimum compensation – though there are inhibitory factors – why acquire something for more that it would be worth in your hands? The ability to exercise discretion might be good (eg. genuine inability to look after the property vs. ruthless developers who rip the roof off to let the rain in)

If there was a statutory duty of care placed on owners of listed buildings, would it make minimum compensation easier?

Several participants said that the amount of work that has to be done to get to point of serving the notice is very onerous and that a building can deteriorate substantially in the time it takes to get all of this done. This means that any works which are carried out tend to be a last-ditch rescue attempt rather than preventative.

<u>Further suggestions:</u>

- Introduce a Preventative Works Notice.
- A lot of LPAs don't like to go down the repairs notice route because they know it leads to CPO and they don't' want or cannot authorise the risk or cost. If CPOs were not seen as the natural successor to repairs notices then LPAs might be more likely to use them.
- Introducing land charges for urgent works notices would be good. This is possible for S215 Notices, but not UWNs.
- Make LPAs more aware of the fact that the 1990 Act obliges them to consider conservation rather than demolition of dangerous structures under the Building Act.

Additional Points:

The quality of information provided in the DCMS Impact Assessment was lacking in quantitative detail in a number of places.

The Interim Penfold Review made very strong comments about the value of LPA conservation officers and the service they provide. One participant suggested that DCMS needs to be reminded of not only the importance of conservation officers' work but also of the fact that for the most part, they are doing a good job - in very tough times.

Where is the evidence base that the system isn't working apart from the complaints of applicants and the dearth of conservation officers in LPAs? If you have any evidence – one way or the other – please send it to DCMS.

ENGLISH HERITAGE

Attendees:

The 36 people who attended the August 16th afternoon discussion on DCMS consultation on the reforms to Listed Building Consent came from the following organisations:

- Heritage Alliance
- Historic Houses Association (HHA)
- Campaign to Protect Rural England (CPRE)
- Church of England
- Institute for Archaeologists (IfA)
- Joint Committee of the National Amenity Societies (JCNAS)
- IHBC
- Historic Towns Forum (HTF)
- Royal Town Planning Institute (RTPI)
- Council for British Archaeology (CBA)
- London and Middlesex Archaeological Society (LAMAS)
- The Kenilworth Society
- Richmond Society
- Heritage Champion
- English Heritage
- Councils:
  Windsor & Maidenhead, Bracknell Forest, Cambridge City, Chichester District, Maidstone Borough, Fareham Borough, Tunbridge Wells, Basingstoke & Dean Councils
- Consultancies:
  Dolmen Building Conservation, Beacon Planning, Nathaniel Lichfield & Partners, Waterman Energy, Environment & Design, Chartered architect

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