ENGLISH HERITAGE

Penfold Reforms and the Enterprise and Regulatory Reform Bill

Notes of Sectoral Discussion 1

English Heritage Offices, 9 August 2012

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 9th 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 and are meant to be read in conjunction with the consultation document. 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:

Streamlining?
This could be an effective means of managing changes that do not affect character/significance (i.e. LBC applied for even when unnecessary - in order for owners to prove that they don't need it and thus avoid criminal prosecution (such as replacing a 1990s kitchen in a Listed Building). It would seem sensible and low-risk to do this via some form of deemed consent as it gives the LPA a right to request more information or detail if necessary, but only if and when necessary. Some felt it might actually free LPAs up to focus on the more complex applications.

Clogging the system?
In practice, perhaps it would be better for all LBC applications to be the same when they come in but for those which might be eligible for 'deemed consent' to go into a special in-tray which the Local Planning Authority (LPA) would be required to look at within 28 days. If ok, it could be deemed consent, if not, then full LBC process would kick in. But then wouldn't everyone just apply for LBC in the hopes that their application might get 'deemed consent' or that the conservation officer didn't get around to looking at the application within the 28 days? Many in the room felt that applicants would just hedge their bets and apply for both – actually placing an extra burden on the LPA.

It was suggested that deemed consent could potentially slow down the process for borderline cases – basically adding 28 days to LBC… This added time could, however also act as a deterrent to applicants who knew that they were going to need full LBC. Guidance could state something like - 'If you are submitting a lot of detailed paperwork, then you'll probably not qualify for deemed consent'.

Asset Grades as a Guide?
There was a brief discussion of the implication of deemed consent on Asset Grades. Should LPAs insist on full LBC for higher grades? Should deemed consent only be considered for Grade IIs, for example? It would seem not as the complexity of proposed changes is not always necessarily connected to the Asset grade, and unnecessary applications can be made for Grade Is as well as Grade IIs. If you start deciding what gets deemed consent based on grade, you are placing too much faith in the Lists, which everyone agreed, were too unreliable.

What already happens in practice
Until fairly recently, LPAs did, in practice, give deemed consent through an exchange of letters or emails to give everyone the safeguards they needed, until it was pointed out that they had no legal right to do so. And there are still cases where the discretion is up to the LPA: if changes are made one way it won't require consent, but if they are done in another way, it WILL (e.g. careful re-pointing by hand v. re-pointing with a disc cutter).

Some felt that LAs *should* have the power to give deemed consent and a duty to say so if asked. This would have the added benefit of enabling them to give guidance on what actually requires LBC – which has been a failing of the sector in the past. Perhaps, then the better option is Option 3 – some form of Certificate of Lawful Works…

Workloads
Someone noted that the big assumption with Options 1-3 is that there are an awful lot of unnecessary LBCs made. This was disputed by many people in the room: just because 9 out of 10 LBCs are approved does not mean that LBC is therefore an unnecessary layer of bureaucracy.

Anyone with an insight into the proportions of LBC applications which could comfortably be handled through deemed consent – and which would clarify the potential savings – is strongly encouraged to respond to DCMS.

Evidence Bases

As is currently the case, decisions rely heavily on the standard of information that is submitted. Neither LBC nor any form of deemed consent can work if the quality of information provided is not enough for a decision. Adding another 28 days to this process would put even more pressure on conservation staff to hurry decisions.

All of this is about the quality of the evidence base. At the moment, we haven't enough good evidence, but is Option 4 the way to improve the quality of the evidence base which might enable LPAs to make snappier decisions in line with existing procedures?

Everyone agreed that what we certainly don't want to end up with is a system where people apply first for a Certificate of Lawful Works (CLW) (see Option 3), get refused, then apply for deemed consent, get refused and *then* apply for full LBC. That would defeat the purpose of the reforms.

Pre-Application Advice (PreApp)

Many agreed that Option 1 would formalise what happens in practice already. A lot of deemed consent is currently being captured in PreApp, which is encouraged by the NPPF and which many LPAs are now charging for. Does the saving made in bureaucracy outweigh the potential income from present or future charging regimes?

On the subject of PreApp, it was pointed out that some highly complex, detailed LBCs appear to get trapped in the PreApp stages. From an owner's perspective it would be good to have a cut-off period in which the LPA makes a call one way or another. Speeding up the process to allow the applicant to know where they stand would be welcome.

Realistic?

There were questions as to the practicality of a 28 day cut-off period for deemed consent for LBC. Compare with what happened with telecoms apparatus – deemed consent went up from 28 days to 56 days, because 28 days wasn't long enough – and 56 days is as long as it takes to process LBC! And the felling of trees in Conservation Areas is allowed six weeks…

Other Questions

- Deemed consent allows for no consultation. What if consultees or planning committee members (who would not be consulted in this process) disagree with the applicant or with the decision?
- What if there is no evidence to justify the proposed change in a deemed consent application – e.g. issues around appropriate viable use?
- What would deemed consent apply to? What kind of criteria or questions would an LPA ask? - minor changes or improvements (e.g. timber windows for UPVC)? But how to define 'minor'?
- What about council owned buildings – how would they get deemed consent?
- What about retrospective applications for deemed consent?
- Demolitions would presumably never qualify for deemed consent.

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

DISCUSSION:

Locally

On a local level, it may be possible to generalise about groups of buildings (e.g. seaside terraces) and say what is and is not possible to do without consent. A bit like an Heritage Partnership Agreement (HPA) – the LPA could simply say, 'I don't want to hear about X, Y and Z types of works', with details published on their website – a sort of inverted Article 4 which permits instead of prohibiting.

Anything of this sort would, however, have to:

- Be justified against the statutory test of desirability of 'preserving and enhancing' (s16 of the 1990 Act, etc), the NPPF and local plan policies
- Give the Secretary of State the power of Veto (like LBC)
- Have a fixed lifespan / review period (like HPAs) – requiring re-consultation and re-justification

Again, a good evidence base would be essential to the success of these consents and many in the room felt that the evidence base was not strong enough, not at a local or national level. But these class consents would be an enabling provision for councils which *do* have a thorough understanding of their assets, though some in the group agreed that it would not work across the board.

Is there a connection to be made between these class consents and localising business rates – i.e. giving people incentives (using class consents) to occupy LBs? There would be scope to use local class consents in tandem with Local Development Orders too as they would cut down on unnecessary applications in areas where development potential is prioritised and help owners/developers to visualise the potential of how to use buildings.

Nationally?
On a national level, this option came down to three possibilities:

1. Writing a class consent for one type of asset nationally – as is already done with some scheduled monuments. Extremely challenging for a myriad of reasons but mainly because of the variation between types of building and the features which create an important part of their significance.

2. Writing class consents for specific bodies who can be trusted to get on with works to LBs (effectively an extension of the concept of Ecclesiastical Exemption (EE)). Some suggested that it is invidious that some large and expert owners (like the National Trust) have to go through the system, while they have consistent and rigorous internal systems. But the group also felt strongly that setting up this kind of system would be onerous even for the most expert bodies and that they sometimes benefit from oversight. In support of this, several people in the room pointed out that even EE is not always plain sailing.

3. Class consents could relate to specific bodies with generic assets and specific works which might cover more than one LPA boundary (e.g. Network Rail or the Canals and Rivers Trust). This could be achieved by way of national HPAs as an alternative. Formalising the process, however, would effectively bypass the LPA's involvement and remove its ability to have a say.

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

DISCUSSION:

Proposed or retrospective lawful works certificates already exist in the planning system but not for LBC. This option would deal with the perennial nervousness about whether something needs LBC or not. A definitive answer would finally be possible and if the process efficiencies suggested for Option 1 were applied (ie. a 28 day turn-around) it could be nice and quick – making applicants happy.

One participant welcomed the idea, saying that it used to be possible simply to exchange emails with conservation officers to agree works to listed buildings that were fairly minor, but now that it is known this is not a legally reliable answer, most responses have become 'please submit for LBC or PreApp'. Things are more bureaucratic now because there is less expertise and confidence in the LPAs; they need to be sure of their legally defensible position and additionally, PreApp can be charged for.

The presumption is that if the LPA was happy to issue a CLW, the work obviously would be low risk. CLW in effect would formalise many PreApp discussions and could also have conditions attached.

How would this actually work in practice – tear-off forms for each piece of work? e.g. "'Yes' to taking down that wall, 'yes' to painting that façade, 'yes' to changing those windows but 'no' to removing that stack"?

A bit like Option 1, a CLW could cover a whole class of works that just need clarity so that the LPA can satisfy itself that it's ok to do them without LBC. It would clearly, however, require some bureaucratic process. When it comes to process efficiencies, would this be more efficient than Option 1? DCMS is keen to hear from practitioners what the implications would be for the volumes of applications and LPA workloads.

Quality of Information

What kind of information requirements would be necessary for CLW? Generally, it was felt that a 'sufficient description of the works so that it is plain what the works are and what the certificate would cover' was the right amount, but obviously every case would be different.

Also, if the LPA were not able to establish the impact or harm from a CLW application, then they should be entitled to ask for LBC and more detail in order to be able to make their decision. This led to a larger discussion about the quality of information currently submitted under LBC and the need to improve this ('just put 'Heritage Statement' as the title on any old rubbish and it will get validated').

What about cases where a CLW is permitted and then something is revealed? Clearly, this would require the same thinking as LBC – if during the course of works things change, the work must stop and the LPA consulted. That's why it would be important to be able to put conditions to a CLW – but then does that make it too similar to LBC for it to be worth doing?

There were also concerns about the retrospective granting of CLW – it would be difficult because any evidence that permission shouldn't have been given consent might have been removed or destroyed! Is it a perverse incentive? It was pointed that it wouldn't really as there is still the ability to prosecute and only works which hadn't needed consent would be appropriate for a CLW.

Other Questions:

- What about charging? Applying for LBC is free – will it continue to be so? What about Deemed Consent or CLW applications?
- And where is the money coming from to fund any of these processes? Government? LPA? More charging?

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

DISCUSSION:

In essence, there are two degrees of intensity for this option:

1. Applicant-appointed consultants give LBC. Could this work? Inherently it is higher risk because it bypasses LPA engagement, public consultation and planning committee scrutiny.

2. Accredited professionals produce reports, paid for by applicants, which the LPA can confidently rely upon and for which they would not have to consult their own conservation staff.

   In practice this does happen already: there are LPAs where applicants proposing very large developments with a large volume of work essentially fund planning, or in some cases conservation, posts. Accreditation might mean something similar: the consultant could declare a thorough understanding of the responsibilities, policy constraints, statutory functions and

guidance responsibilities of the LPA and pledge to give advice in the best interests of the above in order for the LPA to discharge its obligations. This could be expressed both in their accreditation and in the advice they gave.

In actual fact, an accreditation system could happen outside of the legislative framework anyway – without a change in the law. A body would need to step forward or be created in order to do this, though. And what would they do and would it work? Would LPAs and applicants take it up?

Raising the Bar

Some in the room worried that needing a heritage report or impact statement from an accredited expert might become the norm - like Bat reports. This could become a very expensive and wholly retrograde step, especially for large owners, like the National Trust but also for ordinary owners. It was pointed out, however, that an LPA cannot simply refuse an application because it is not submitted by an accredited professional.

Getting it Wrong

What happens if that accredited expert gets it wrong? This would lead to judicial review and legal battles, etc, with the costs potentially falling to the LPA but the accreditation would reduce the risk and provide the LPA with a means of redress as the agent would owe the LPA a duty of care.

What about a situation where an accredited agent puts forward recommendations that are perpetually overturned? How would poor performance be dealt with?

The suggestion was that it was simplistic and unrealistic to consider conservation work to be comparable to building control work and that it therefore could be run the same way.

What about people who don't have the skill to make the expert recommendations? It's one thing to understand the LPAs statutory and policy requirements, but specific heritage expertise is also required for this work. In terms of an accreditation system, would it be possible to have one single heritage accreditation or should there be sub-categories of accreditation (e.g. for Medieval buildings, C20 buildings, etc). The challenge is to figure out what the accreditation system might look like. Any thoughts?

Perhaps it's about accrediting an organisation rather than a person.

A Duty of Care

There was concern, including from some private consultants in the room, that it would be impossible for accredited agents to overcome the inherent bias of trying to please the person who was commissioning their work.

In the Public Interest

There was also much concern about whether this could be reconciled with the LPA's role as working 'in the public interest'. It's the democratic duty of LPAs to scrutinise applications and it was generally felt that consultants could not be guaranteed to work the same way. Furthermore it was felt that it would not be right to put the regulatory process in the hands of applicants or their consultants.

There was a discussion about whether the accredited professionals would actually be making the decisions or just writing the reports upon which the decisions were based. How does that differ from what we have in practice already?

Someone pointed out that there is also a risk that the public will lose faith in such a potentially unaccountable consent process and also even stop believing that the listing regime is in their interests.

Two heads are better than one

It was generally agreed that giving power to consultants to make recommendations without being quality-controlled by conservation officers is a big risk. Even if the application is extremely thorough and well presented, it's not for an admin assistant to make the call – it needs someone with the expertise to critique the arguments. The ability of conservation officers to question or challenge a heritage statement is a hugely important part of the LBC process. In practice how would this work if a conservation officer disagreed with the recommendation from a consultant? Worse, what if there was no conservation officer to do this?

It was also pointed out that no two people ever have the same opinion on significance, impact and harm. One consultant pointed out that he would be deeply uncomfortable with sole responsibility of making such contested recommendations or decisions for an LPA – and on behalf of his client.

Skills Gaps

The group agreed that the debate between specialists is a crucial part of the LBC process and helps everyone to unpick where the significance and public interest actually lie. After all, two heads are better than one. Although LPAs may have less expertise and fewer resources than in the past, they should still have the ability to question and scrutinise proposals.

There is also the danger that the use of accredited experts may be seen as an opportunity for LPAs to further reduce resources – many in the room warned against this.

But – a big but - it was highlighted that the fundamental problem is just this, that expertise is being squeezed out of the system at the moment through lack of resources. Getting accredited people may very well be the way to get expertise back into the system if LPAs cannot carry the cost of it themselves. There are dangers, but with sufficient safeguards in place, the right level of expertise can continue to be provided in the public interest.

Someone else agreed and said they thought the proposals were being put forward as a result of the fact that conservation officer numbers are down. Government is attempting to fix this problem (and boost growth) by bringing in the private sector but maybe the point is actually to fix the problem – more conservation officers with more local knowledge and expertise.

There is potentially a large role for the private sector to provide expertise and, if managed correctly, it could make decisions better and faster but it does not have to become subsumed into the statutory process. Maybe LPAs just need to be stricter about requiring the information they are already entitled to ask for in the existing system.

Also there are other roles that accredited agents can take to improve the system but not working necessarily just for the LBC applicant. If it's about finding a way to involve the private sector more, then there is more outside-the-box thinking to be done about these and other options.

Reform of measures available to address building neglect:

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)
- 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 (e.g. a genuine inability to look after the property vs. ruthless developers who rip the roof off to let the rain in)

All of this ultimately comes down to the financial risk to the LPA which they are unable and unwilling to fund. Perhaps there could be a new way of underwriting this – someone to underwrite things in the short term or offer a bridging loan to enable LPAs to take the risk issue UWNs and CPOs. Is there a role for a regional property board or an asset board who could underwrite or own the asset? A Trust?

There is also the enormous difficulty of getting in touch with owners – especially if they are not an individual person or are based abroad (or both). Many in the room agreed that this was a big obstacle to tackling local HAR.

What about putting on a land charge? It is possible already for LPAs to recover land charges via debt collection but it is not well known and the timescales are too long for it to be considered worthwhile.

Additional Points:

Concern was expressed about the degree of detail required to justify some of the Options which DCMS was proposing, and the fact that they do not appear to have the evidence to underpin the Options – or indeed they are asking for in the consultation. Participants were happy to provide this information to enable DCMS to take more informed action but the short timescale for the consultation does make this difficult, if not impossible.

The opportunity of the ERR Bill – which has prompted the short timings – was also acknowledged. There was a wary consensus that something useful ought, ultimately, to be obtained from the process.

Attendees:

The 37 people who attended the August 9th discussion on DCMS consultation on the reforms to Listed Building Consent came from the following organisations:

- English Heritage
- DCMS
- Country Land and Business Association (CLA)
- British Property Federation (BPF)
- Institute for Archaeologists (IfA)
- Bucks Archaeology Society; Chiltern Society
- Ancient Monuments Society (AMS)
- Association of English Cathedrals (AEC)
- Institute of Historic Building Conservation (IHBC)
- National Trust
- SAVE Britain's Heritage
- Civic Voice
- Society for the Protection of Ancient Buildings (SPAB)
- Councils:
  LB Lambeth, RB Kensington and Chelsea, City of London, York City, Cambridgeshire, New Forest District Council, LB Enfield, Test Valley, LB Hillingdon
- Consultancies:
  Donald Insall Associates, Museum of London Archaeology Services, Drury McPherson Partnership, Drivers Jonas Deloitte, Nathaniel Lichfield & Partners, individual consultants

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