

27 March 2015

Mr Noel Fojut
The Scottish Government
Culture & Heritage Directorate
Area 2H (North) Victoria Quay
Edinburgh
EH6 6QQ

Dear Noel

HISTORIC ENVIRONMENT SCOTLAND ACT: SECONDARY LEGISLATION CONSULTATION PAPER

Built Environment Forum Scotland (BEFS) is a forum that brings together non-governmental organisations with a built environment remit and acts as national intermediary for Scotland's historic environment sector.

Our response has been formed through our HES Act Taskforce which drew on expertise from Archaeology Scotland, Architectural Heritage Society of Scotland, Chartered Institute for Archaeology, Garden History Society in Scotland, Institute of Historic Building Conservation, National Trust for Scotland, Royal Town Planning Institute in Scotland and the Society of Antiquaries of Scotland.

I trust these comments are useful – please get in touch if you require any further information.

Yours sincerely,

Euan Leitch
Advocacy and Communications Officer.

Consultation Questions

Chapter 1 – No Questions

Chapter 2 – Listing and Scheduling

Q1. Do you agree with the approach taken in the Regulations covering the notification of listing and Scheduling?

Yes No Undecided

Clarity on who is consulted on listing proposals is desirable and would parity for scheduling, as recommended by the ClfA be possible?

The HES Act 2014 transferred the authority to designate conservation areas from the Secretary of State to HES but in practice new conservation areas are most commonly designated by local authorities. The secondary legislation makes no mention of conservation areas and some clarity of roles should be provided.

It would be good practice for the HES website to include a monthly list of the latest amendments to the Schedule and List, noting new additions, amendments and deletions. This would allow stakeholders beyond the owner, occupier and local authority to remain fully informed.

Chapter 3 – Consent

3.1 Scheduled Monument Consent

Q2. Do you agree with the general approach taken in the Regulations covering applications for SMC?

Yes No Undecided

Please give details

Neighbourhood notification is not being required for applications for SMC and this may result in communities being disenfranchised should they be unaware of alterations until works are carried out. HES should develop criteria for notifying local communities of SMC applications and these should be published, the solution perhaps being worked out in collaboration with local authorities.

3.2 Listed Building Consent and Conservation Area Consent (LBC and CAC)

Q3. As an NDPB Historic Environment Scotland will be treated in the same way as an external applicant when they are carrying out works at the properties in care (the 345 historic properties conserved and opened to the public by HES on behalf of the Scottish Ministers).

All applications and decisions including HES' will be published. This means that the system will be transparent and the public will be able to compare the approach to internal and external applications. Do you agree with the approach to publish all applications and decisions?

Yes No Undecided

Q4. The current administrative arrangement whereby applicants are given a provisional view on whether or not they are likely to be granted SMC will cease once these Regulations take effect. This extra step in the process was useful in the absence of a right of appeal to give applicants the chance to challenge the decision or any conditions attached before the decision was issued. However discussions with stakeholders suggest that they saw pre-application engagement as a more important tool for ensuring a dialogue between HES and the applicant, and the new right of appeal gives applicants a more formal way to appeal the decision to Ministers. Do you agree with the decision to no longer issue a provisional view?

Yes No Undecided

Please give details

Pre-application engagement is important but clarity on who is involved in such discussions is necessary to avoid the SMC process being seen as confirming a pre-arranged agreement between the applicant and HES. Outside stakeholders should be included in the pre-application discussion.

Q5. The draft Regulations do not include the circumstances in which HES, where they intend to grant consent, will be required to notify Ministers about an application for SMC. These circumstances will be set out subsequently in directions and may include cases where the decision is likely to represent a significant departure from established policy or where there are other related consent applications, for example planning consent. Please give details of what you think such criteria might be?

Presumably the triggers for notifying Ministers will be similar to those in the Town and Country Planning (Neighbouring Planning Authorities and Historic Environment)(Scotland) Direction 2014.

Q6. Do you agree with the approach taken in the Regulations covering applications for LBC/CAC?

Yes No Undecided

Please give details

No timescale has been given for HES to respond to the local authority consultations. SNH's A Service Statement for Planning and Development 2012 Annex B gives clear guidance on their consultations response times and also gives a clear understanding of their levels of response.

Q7. Do you agree with this administrative approach?

Yes No Undecided

Please give details

BEFS support the requirement for local authorities to consult HES upon applications for category A and B Listed buildings and upon all applications for the demolition of any category of listed buildings and buildings in conservation areas.

Does the wording of the legislation actually require LAs to consult HES on applications for conservation area consent? See page 62 31.(2)(c).

The new system replacing the RDN must be fully transparent with the arrangements for each local authority consulted upon and published on the HES website (the current arrangement is either not published or impossible to locate). The conditions must explicitly reflect local authorities' available capacity and archaeological and architectural expertise. The monitoring programme for the new system must also be agreed in advance and regularly reported upon.

Q8. Do you agree that a freestanding access statement should be the exception rather than the rule?

Yes No Undecided

Q9. Would you like to offer any comments, for example in relation to thresholds for such a requirement?

Chapter 4 Appeals

4.1 Appeals against Listing and Scheduling

Q10. The draft regulations for appeals against listing and scheduling set out the procedural details for making an appeal. Do you agree with the approach taken in the regulations?

Yes No Undecided

Please give details

It is unclear why tenants and occupants are being given the right to appeal against listing/scheduling. If rights are being extended beyond the owner the demand for third parties to have the right of appeal against a refusal to designate may be given a more powerful argument.

As this is expanding the role of the DPEA it is imperative that Reporters have the necessary heritage expertise to handle these appeals.

4.2 Grounds for Appeal

Q11. Do you agree that this approach will provide a suitable basis for grounds of appeal against scheduling and listing? Are there further areas/ grounds for appeal which should be considered?

Yes No Undecided

The second bullet point on pa18 should read "That the building is not of special *architectural* or historic interest..."

4.3 Scheduled Monument Consent

Q 12. The draft Regulations for appeals in relation to scheduled monument consent set out the procedural details for making an appeal. Do you agree with the approach taken in the Regulations?

Yes No Undecided

Do you have any further comments?

4.4 Scheduled Monument Enforcement Notices Appeal

Q 13. The draft Regulations for appeals in relation to Scheduled Monument Enforcement Notices set out the procedural details for making an appeal. Do you agree with the approach taken in the Regulations?

Yes No Undecided

Do you have any further comments?

BEFS support the comments from the ClfA. There needs to be sufficient flexibility to allow those time limits to be extended, particularly in relation to the response of HES, where the issues are sufficiently complex to warrant more extensive consideration and where, for instance, third party expertise needs to be consulted. In most cases this should not arise since HES should be conversant with the issues prior to the issue of the Scheduled Monument Enforcement Notice. However, in some cases the statement of appeal may raise fresh issues which need further consideration.

Chapter 5 – Other changes and further information

5.2 Environmental Impact Assessment & the Planning system

Q14. Do you agree with the removal of the requirement to consult the Scottish ministers on EIA's and the new requirement to send a copy of the environmental statement to minister for information?

Yes No Undecided

5.4 Scheme of Delegation

Q15. Do you have any comments on this approach?

Yes No Undecided

Do you have any further comments?

BEFS would reiterate the questions raised by the NTS.

Property owners must be consulted prior to any delegation of management duties to a third party. This is a matter of natural justice.

Who will be responsible for assessing the conservation deficit of a Property in

Care? Will this be Historic Environment Scotland, therefore creating an agency problem?

To protect both owners and tax-payers, a robust and transparent assessment of the current condition of guardianship properties is needed before Ministers can be confident in the implications of transferring management, and of the conditions to be put in place with the managing agent.

An evidence-based approach to condition, conservation deficit, management requirements and public subsidy will provide the basis for delegated management to any eligible third-party.

Conservation burdens - can these be attached to any delegated management?

What process will be in place regarding the acquisition of future Properties in Care? Will the Historic Environment Strategy for Scotland partnership have a role in informing strategic priorities for the estate? Or, for that matter, Historic Environment Scotland?

5.5 Transitional arrangements

Q 16. Do you have a preference for which option should be taken forward?

Please select one

- Option 1
Option 2
Undecided

Q 17. Are there any particular issues in relation to ongoing cases during the transition phase which you feel might particularly affect you or your organisation?