

## 2. The Statutory and Policy Context for Maintenance

### 2.1 Introduction

This section of the report identifies the current and developing statutory and policy context for the maintenance of listed buildings. Key statutes and policies are identified, the implication of these in regard to the maintenance of listed buildings is examined and any significant issues arising are discussed.

### 2.2 Context

John Earl (1996, p47) provides a good summary of the statutory context in the UK which is worth quoting in full:

The British system, for example, protects a large number and wide range of buildings and can be effective in preventing or limiting damage. It is not ideally designed for the promotion of conservation initiatives. It provides relatively little in the way of financial incentives, being based firmly on the assumption that, since most of the buildings are not of great antiquity and are perfectly capable of earning their keep in a modern world, the responsibility for care should rest almost entirely with their owners. Building owners may be inconvenienced if they turn to unskilled advisers or attempt to carry out works without professional help and are then unable to steer their proposals through the official obstacle course, but they are not actually required to employ experts.

The position is much the same on the official side. Although the operation of the controls is left largely to district planning authorities, they are not required to employ specialist staff; and those who do, rarely assign them to senior positions in their planning departments. Here again, the philosophy informing the legislators seems to have been that the general run of preservation work is not particularly demanding. In the more important cases the expertise of national agencies like English Heritage will — or so it is assumed — be brought into play. The controlling local authorities themselves (I am tempted to say ‘as a result’) vary widely in performance. Few of them see building conservation as a major responsibility and some take virtually no interest in it at all. Even the most committed make relatively little use of (for example) emergency repairs powers. Prosecutions for illegal works are uncommon and the central agencies rarely intervene where local authorities have failed to act.

### 2.3 Legislation

#### 2.3.1 The primary Act

The primary legislation which provides the statutory context for any activity related to listed buildings in England and Wales, including maintenance, is the *Planning (Listed Buildings and Conservation Areas) Act 1990* (hereafter referred to as ‘the Act’). The Act requires owners of listed buildings to seek permission (Listed Building Consent) for changes which ‘would affect its character as a building of special architectural or historic interest’ (c.7, Chapter II, paragraph 7). Such changes may, to a greater or lesser extent, include some maintenance works. Crucially

however, there is no specific duty of care or requirement to maintain a listed building imposed by this Act.

There are a series of provisions within the Act for local authorities to react to situations where listed buildings are not being properly maintained:

- under section 48 of the Act the local authority can serve a notice on the owner of a listed building setting out the repairs needed for the 'proper preservation of a listed building';
- section 38 provides another legal sanction, the Listed Building Enforcement Notice. This is primarily intended to be served on an owner in circumstances where unauthorised works to listed buildings have been undertaken, although the Act provides for the right of entry by a variety of authorities to ascertain whether a listed building is being 'maintained in a proper state';
- under section 54 of the Act local authorities may serve an urgent works notice where they consider that the owner has allowed an unoccupied listed building to fall into a state where the 'preservation' of the building is threatened. The Act gives local authorities the power to undertake works and recover costs which are 'urgently necessary'. Further to this the local authority also has the power to compulsory purchase a listed building where they believe the owner is not taking necessary steps to ensure the preservation of that building.

In relation to the care of the fabric of listed buildings the Act is reactive in nature and shows concern for maintenance only in so far as encouraging intervention once neglect reaches the point of severe damage. In addition, the remedies to neglect are cumbersome and potentially expensive for local authorities to administer (although there is grant aid for local authorities from English Heritage for irrecoverable costs associated with the implementation of the remedies in the Act). Another problem with the Act is that definitions, such as 'urgently', for example, are not well defined and there is no defining case law.

### **2.3.2 Other relevant planning statutes**

*The Town and Country Planning Act 1990* sets out the planning powers that local authorities and the Secretary of State may use, though there is no specific reference to maintenance in this Act. However *Section 215-219* of this Act enables local authorities to force a landowner to undertake remedial works to land (and by implication buildings) if the 'amenity is adversely affected by the condition of land in their area' This provision enables local authorities to force an owner to undertake maintenance or repairs or for the local authority to enter the land in order to undertake the work and reclaim costs. There are no compulsory purchase powers available under this section. Similarly to the *Planning (Listed Buildings and Conservation Areas) Act 1990* the provisions of *Section 215 -219*, are entirely reactive and really only apply to a serious lack of maintenance requiring substantial repair. Research suggests (Robinson, 2001) that the reticence of local authorities in using this instrument might relate not only to a lack of ministerial guidance but also a lack of knowledge of its existence.

*The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997* and the *Planning (Northern Ireland) Order 1991* differ little in substance from the 1990 Act for England and Wales. They provide the same remedies where an owner has not maintained or deliberately neglected a listed building as the English and Welsh Act.

### 2.3.3 Other key statutes

In addition to the key statutes, there are a number of other Acts and statutory instruments which provide a context for building maintenance (including but not specifically for listed buildings). It is not in the remit of this research to comment on these in detail. However, the most significant of these are identified below:

- The *Building Act 1984* governs the standards of building construction work in England and Wales including the provisions commonly known as the Building Regulations;
- The *Fire Precautions Act 1971* and the more recent *Fire Precautions (Workplace) Regulations 1997* regulate the means of escape and requirements for the issuing of fire certificates;
- The *Defective Premises Act 1972* imposes a statutory duty on those providing or working on a dwelling to ensure that the work is of a proper standard;
- The *Occupier's Liability Acts 1957 and 1984*, imposes a duty of care owed by the occupier of a building to those, authorised or not, visiting that building;
- The *Environmental Protection Act 1990* deals with statutory nuisance and abatement notices;
- The *Housing Acts 1985 and 1989* set out the minimum standards for rented dwelling houses known as the 'fitness standard' and the tenants 'right of repair';
- The *Party Wall Act 1996* requires owners to agree a Party Wall Award with adjoining owners regarding building works (including maintenance) on or close to party walls;
- The *Disability Discrimination Act 1995* requires building owners to make and maintain 'reasonable adjustments' to access arrangements of places of work.

## 2.4 Planning policy

*Planning Policy Guidance Note 15: Historic Buildings and Conservation Areas (PPG15)* is the guidance note detailing policies for the identification and protection of historic buildings, conservation areas and other elements of the historic environment. Currently a consultation exercise to revise PPG15 is in progress. The current PPG15 is clearer than the Act about the importance of maintenance for historic buildings and specifically identifies the role that individual owners have in this:

Regular maintenance and repair are the key to the preservation of historic buildings. Modest expenditure on repairs keeps a building weather tight, and routine maintenance (especially roof repairs and the regular clearance of gutters and down pipes) can prevent much more expensive work becoming necessary at a later date. It is a common misunderstanding that historic buildings have a fixed life span, and that gradual decay of their fabric is inevitable. On the contrary, unless there are intrinsic defects of design or materials, the life span of a historic building may be indefinite provided that timely maintenance, and occasional major repairs such as the renewal of roof coverings and other features, are regularly undertaken. Major problems are very often the result of neglect and, if tackled earlier, can be prevented or reduced in scale. Regular inspection is invaluable. (section 7.1)

The guidance note goes on to state that,

There is no specific duty on owners to keep their buildings in a good state of repair (though it will normally be in their interests to do so), but local authorities have powers to take action where a historic building has deteriorated to the extent that its preservation may be at risk. (section 7.4)

PPG 15 also suggests that an important role for local authorities is in monitoring the condition of listed buildings within their area in order to ensure early warning of a building suffering a lack of maintenance. This, the guidance suggests, will enable early and appropriate use of the powers available.

PPG 15 clearly states that there is no duty of care imposed on owners. It identifies that maintenance and inspection are a fundamental part of conserving listed buildings, but provides no positive framework for encouraging this. The guidance is reactive in regard to listed building condition: the emphasis is not on positive encouragement and support, but on monitoring and policing the condition of listed buildings.

In Scotland *National Planning Policy Guideline: Planning and the Historic Environment (NPPG 18)* is the relevant planning policy advice. This was drafted more recently than PPG15 and does have some significant differences of emphasis from the English guidance. For example, it does not include the passage regarding the fundamental importance of regular inspection and 'modest repairs and routine maintenance'. The document does, however, place greater emphasis on the importance of proactive rather than reactive approaches generally.

*Planning Policy Statement 6 (PPS 6) - Planning, Archaeology and Built Heritage* is the relevant planning policy for Northern Ireland and differs little in content or detail from the text of PPG15.

## **2.5 Value Added Tax (VAT)**

The rules surrounding the relevant rate at which Value Added Tax (VAT) is charged for works to listed buildings are complex. Essentially VAT is charged at the full rate (17.5 per cent) on all repairs and maintenance activity for all buildings, whether listed or not. Conversely for approved alterations and demolition of listed buildings, VAT is zero rated (as long as Listed Building Consent has been obtained prior to the work being undertaken). For non-VAT registered occupiers of listed buildings (the vast majority) this means that a premium of 17.5 per cent is put on the costs of maintenance works. By placing this premium on maintenance activities, VAT works directly against the stated policies contained in PPG15 and other documents which promote maintenance. VAT rates cannot be changed without a change in European Union (EU) regulation. The issue is due to be considered later this year by the EU.

To compensate for the VAT rate there have been some recent changes in regard to VAT on places of worship. On eligible and approved fabric maintenance and repair works, the VAT rate has been effectively reduced from 17.5 per cent to 5 per cent by giving a grant aid which amounts to 12.5 per cent of the costs. The UK government has argued that this temporary supplementary grant will remain until a ruling from the European Union (EU) about changes to VAT rates occurs sometime this year. However, this grant aid does not apply to non-church listed buildings.

## 2.6 Health and safety

Health and safety policy and statute in regard to all construction activities, including maintenance, has increased in volume and complexity in the last 15 years. There are no specific Acts or regulations aimed specifically at maintenance activity. However all current statutes and regulations apply to building maintenance activities.

The primary legislation is the *Health and Safety at Work Act (1974)*. This enabling Act provides general principles and a framework for a range of regulations and statutory instruments governing the management of health, safety and welfare issues of people at work and those members of the public potentially affected by others' work. The Act sets out a series of general principles and responsibilities in regard to health and safety in regard to employers, the self-employed, manufacturers, designers and the employed. The principles of UK wide construction health and safety legislation is that risk assessment and risk management are essential in maximising accident and injury prevention. Training, communication, method statements, appropriate experience and applied knowledge are also key components and principles to be adhered to.

Much of the regulation in the last 12 years has come from the implementation of European Commission directives which have attempted to harmonise health and safety legislation across the EU. A number of regulations related to construction activities are currently in force. The most significant of these are:

### *The Construction (Design and Management) Regulations 1994*

These define and apportion responsibility for health and safety of construction activity. They are specifically intended to ensure that consideration is given to health and safety issues for the subsequent future management of the building (i.e. maintenance). The scope of construction activities relates to medium-long term works, and thus larger maintenance contracts would be included by the full regulation but small works are not covered by the full regulation;

### *The Management of Health and Safety at Work Regulations 1999 and The Construction (Health, Safety and Welfare) Regulations 1996*

These provide for an extension of an employers general responsibility to ensure safe and healthy work places and work practices and. Both these sets of regulation contain specific detailed requirements relevant to maintenance activity. For example, reference is made to regulations governing protection from falls from heights. How this might be achieved in circumstances where it might be required for a long period of time, for example in the fixing of a roof covering, and how it might be achieved during a short period of time, for example for gutter clearance is discussed in the supporting documentation to the regulation. The requirement for edge support is obligatory in both cases. No compromise is made for the longevity or financial value of the works concerned.

Beyond these sets of regulation there are a large number of regulations relevant to specific maintenance activities. For example the *Provision and Use of Work Equipment Regulations 1998* governs the use of scaffolds, ladders and access equipment; the *Control of Substances Hazardous to Health Regulations 1999* controls materials and consequences of some building activity. There are large number of other regulations dealing with specific building activities and materials which apply to specific maintenance activity.

Given the statistical health and safety risks involved in building maintenance activities it is reasonable that current regulation is stringent. For example Health and Safety Executive (HSE)

statistics indicate that building maintenance activities (including repair) represent 42 per cent of construction related deaths and serious injuries (HSE, 1990). Legislation and regulation insists on risk assessment and careful consideration of each and every activity, in each new situation/circumstance. As the nature of building maintenance activity frequently consists of a wide range and high number of differing activities, it produces a high requirement for individual health and safety considerations.

## **2.7 Buildings at risk**

Buildings at Risk surveys and data have been collected nationally by English Heritage since the early 1990s. These surveys are designed to promote a positive approach to conservation by highlighting those buildings which are at risk from neglect. This is the only systematic survey of the condition of a sample of the UK's listed buildings. Currently this national data on condition and vulnerability only covers grade I and II\* except in London where Grade II buildings are included. This represents a small proportion of the total listed buildings in the UK. This data is compiled and published annually. The buildings at risk registers are used as an indicator of the effectiveness of conservation policy: for example, they form one of the performance indicators for the State of the Historic Environment Report 2002 (English Heritage, 2002). There is very little discussion in any documentation related to the Buildings at Risk surveys or registers regarding the potential risks posed by a lack of maintenance.

Despite strong encouragement (from English Heritage) for local authorities to complete and maintain a local Buildings at Risk register (for all grades), recent research (Institute of Historic Building Conservation, English Heritage and Oxford Brookes University, 2003) suggests that many local authorities (23 per cent) fail to do this and that only one third of those producing a register regularly updated this. This represents a significant missed opportunity to consider the national effectiveness of policy as there is no comprehensive national assessment of the condition of listed buildings. As the report states:

...the absence of a comprehensive up to date and systematic approach to dealing with buildings at risk of all grades is one of the fundamentally absent 'building blocks' of conservation policy and management and is a key finding of this survey. (p43)

## **2.8 Grant aid and maintenance**

Grant aid is available for repair works to listed buildings. The paradox of this situation is that this effectively rewards neglect or poor maintenance management. The publicly funded grant aid that is available for repair is restricted to grade I and grade II\* buildings and places of worship, including cathedrals. No major public repair grant funding is currently available for the majority of listed buildings (grade II).

Under *Section 57 of the Planning (Listed Buildings and Conservation Areas) Act 1990*, Local authorities have the opportunity to establish a conservation grant or loan on any building they consider historic. Such grants or loans can be made available for 'non-normal maintenance' or associated works (such as installation of access hatches to inaccessible valley gutters). The provision of loans or grants for such purposes is very rare, as local authorities have limited financial resources and other priorities.

English Heritage (EH) grant aid schemes are approved on the condition that the recipient undertakes regular maintenance on completion of the grant aided works. Anecdotal evidence is that this is very rarely, if ever, enforced.

There is some evidence that the principal grant giving bodies in the UK have recognised that the award of capital grant should be justified through conditions regarding the development of maintenance plans. For example the Heritage Lottery Fund (HLF), the largest provider of grant aid for the conservation of listed buildings is committed to:

Producing guidance and support on how to write maintenance plans and more rigorously monitoring contract compliance in this area, in order to raise the profile of the importance of maintaining heritage. (HLF, 2002, p 4)

However the means by which this is to be verified is yet to be tested. The latest joint 2 stage EH/HLF *Places of Worship Scheme* requires (and helps fund in stage 1) the development of a 10 year maintenance plan as part of the overall scheme of repairs. The implementation of the maintenance plan is a condition of the grant contract, a period of 10 years. In the contract the following monitoring conditions apply:

Once the Works have been completed you must maintain the Place of Worship in good repair and condition as specified in the Maintenance Plan which was agreed as part of the Stage One Development Contract. During the life of this Contract you will need to submit an annual return to EH certifying that you have met this requirement, and you will inform EH within five working days of any significant loss or damage to the Place of Worship. (English Heritage, 2003a p19)

In *The Historic Environment: a Force for Our Future*, the Department for Culture Media and Sport (DCMS) state that their response to the recommendation in *Power of Place* (English Heritage, 2000) to 'encourage better maintenance', will be through changes to the repairs grant aid system:

The Government fully endorses the increasing importance attached to the preventative maintenance of historic fabric. In discussions with English Heritage about the future funding priorities, it will explore how a shift of emphasis towards preventative maintenance might be reflected in grant programmes (p36)

## **2.9 Current views and trends in conservation policy**

### **2.9.1 English Heritage Review**

*Power of Place* (English Heritage, 2000) is the final report of a review of current and future priorities for the historic environment. The review was commissioned by the Department of the Environment Transport and the Regions and DCMS. It assessed the value of the historic environment in contributing to sustainable development, prosperity and quality of life in the future. The findings of the review were based on a wide consultation exercise and as such can be considered to be representative of the current concerns of the building conservation world. The review specifically identifies broad changes in policy and makes recommendations for all those with an interest in the historic environment. This includes Government, local authorities, the heritage sector and owners. Increased attention to maintenance was a key priority of this report. It is worth highlighting the full content of the recommendation relating to maintenance:

**Encourage better maintenance**

For the Government:

- a. Introduce a statutory duty of care on owners of listed buildings, scheduled monuments and registered parks and gardens, provided it is supported by fiscal incentives and wider availability of Grants.
- b. Make public bodies accountable, through regular monitoring for their performance in maintaining their historic estate.

**For the Heritage Sector:**

- c. Promote a shift from cure to prevention, by encouraging regular condition surveys and planned maintenance and piloting self-help initiatives and low cost insurance schemes

**For Owners:**

- d. Carry out routine maintenance and regular condition surveys (p20)

## 2.9.2 Department for Culture Media and Sport

In *A Force for our Future* (DCMS, 2001), the Department's response to the recommendation encouraging 'better maintenance' is limited. Actions such as changes to the grant system (which excludes 94 per cent of listed buildings) which would insist on maintenance conditions to capital repairs grant is unlikely to have a significant impact on the encouragement of better maintenance for the overwhelming majority of the listed stock. The document confirms that Government managed listed buildings will continue to be subject to performance monitoring which is currently undertaken by Government Historic Building Advisory Unit (GHBAU) (now known as Government Historic Estates Unit (GHEU)). There is currently no obligation for departments to provide information to GHEU or to adopt the guidance.

The most recent opportunity to gauge the potential future direction for policy in relation to the maintenance of listed buildings comes from the recently published consultation paper from DCMS *Protecting Our Historic Environment: Making the System Work Better* (DCMS, 2003). In the foreword to the consultation paper the Secretary of State acknowledges that the review is timely and that the aim of reforming the system should be to create:

a more simple, open, flexible but rigorous system, which engages the imagination and will encourage owners and the community to invest in the fabric of their history. (p2)

The text of the consultation paper pays little attention to the recommendation made in *Power of Place* regarding the encouragement of better maintenance. There are, however, three related proposals. Arguably the most important proposal in relation to maintenance is that requiring a 'statement of significance' for listed buildings. One option considered, however, is that such statements would only be required for new listings and for existing entries when Listed Building Consent was sought. *Informed Conservation* (English Heritage, 2000), which is commended by DCMS in *A Force for Our Future*, expresses concern about the way in which small incremental changes, such as a variety of maintenance activities can have a considerable effect on cultural significance.

Another maintenance related proposal raised in the consultation paper is that the Government intends to provide each listed building owner with an information pack explaining the significance of their building and the reasons why it is listed. This would also contain information on 'what they can do to protect and enhance their asset'. Better information and support for owners is critical if owners are to be encouraged to undertake 'better maintenance'.

A third maintenance related issue raised in the consultation paper is the possibility of a requirement for listed building owners to keep a property log book. The context for this proposal is the *Draft Housing Bill: Consultation* document which contains a requirement for all those selling a property to compile a seller's pack, containing information about their property for prospective buyers. The consultation paper suggests that for listed buildings this might include information on works that have been carried out to the building as well as information on why the building was listed.

The report on *Streamlining Listed Building Consent* (Office of the Deputy Prime Minister/English Heritage 2003b) considers management agreements for listed buildings, which would provide the parties to such agreements with certainty about what interventions will or will not require listed building consent. Although the report does not discuss maintenance in any detail, it does report the results of a survey in which users of such management agreements appreciated certainty about what routine activities are acceptable and desirable. The report also contains an interesting comparison of the statutory context for conservation of the natural environment compared to that of the historic built environment. The report suggests that the statutory context for the conservation of the natural environment is a proactive form of management, whereas the statutory context for the conservation of the built environment is characterised as a reactive management regime.

Perhaps the most positive and integrated policy development is that to be found in the recently published guidelines *Managing Local Authority Heritage Assets* (English Heritage, 2003c). This proposes a coherent set of procedures, policies and tools for the pro-active management of heritage assets, including listed buildings. The fundamental need to understand what is of cultural significance as a pre-requisite for any management is identified by the guidelines:

Understanding the nature, significance, condition and potential of a heritage asset must be the basis for rational decisions about its management, use, alteration or disposal. A sound, but succinct, understanding of a heritage asset is therefore essential. (p8)

There are clear references to the need for preventative maintenance

Planned maintenance and repair programmes are essential for all heritage assets, and should be based on regular, detailed inspections and condition reports. Best value reviews and the asset management plan process should provide the context in which managers can prioritise and establish programmes. (p25)

Part of the context for these guidelines is the *Power of Place* suggestion that local authorities and government should be an exemplar of good practice. The other context for this is Best Value. This is a concept and series of attendant policies and procedures for the way in which local government measures, manages and improves its performance. The intention of Best Value is that local authorities should consider the performance of their services in a strategic and long term fashion, providing services which are wanted by those using them and in a way which is financially efficient. Within the context of Best Value all local authorities are required to develop Asset Management Plans. These should establish a strategic and operational plan for all the property assets managed by the local authority. Following the Audit Commission's advice (2000), local authorities are also required to review and justify the extent of property holdings.

## **2.10 Conclusions**

The statutory and policy situation is not coherent with regard to maintenance particularly in regard to co-ordination between statutory instruments, Acts and fiscal measures. Indeed some aspects, such as the VAT situation, seem to actively discourage preventative maintenance and there is little that supports the development of pro-active approaches.

Until recently there has been no clear leadership on maintenance for listed buildings at policy level. However, within the context of increasing attention by policy makers to the strategic issue of understanding cultural significance, its vulnerability and the development of appropriate policies and action, there has been increasing emphasis on the importance of maintenance as a critical conservation activity.