

# **HISTORIC ENVIRONMENT (AMENDMENT) (SCOTLAND) ACT 2011**

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## **EXPLANATORY NOTES**

### **THE ACT – SECTION BY SECTION**

#### **Part 3 – Modifications of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997**

##### ***Section 18 – Certificate that building not intended to be listed***

72. **Section 18** inserts a new section 5A into the 1997 Act enabling Scottish Ministers to issue a certificate that they do not intend to list a building during the five years from the date of the certificate. Any person can apply for such a certificate.
73. Subsection (2)(b) of section 5A states that for that 5 year period a local planning authority may not serve a building preservation notice in relation to the building or affix such a notice under the terms of section 4(1) of the 1979 Act.
74. Subsection (3) requires that a person applying for a certificate must, at the same time, inform the local planning authority within whose district the building is situated of the application.

##### ***Section 19 – Offences in relation to unauthorised works and listed building consent: increase in fines***

75. **Section 19** raises the level of fines on summary conviction under section 8 of the 1997 Act (offences) to £50,000. This relates to a conviction for an offence described in section 6 or 8(2) of the 1997 Act – the carrying out of unauthorised works on a listed building or non-compliance with a condition of listed building consent.

##### ***Section 20 – Declining to determine an application for listed building consent***

76. **Section 20** inserts a new section 10A after section 10 of the 1997 Act enabling planning authorities to decline to determine an application for listed building consent in certain situations. Subsections (1)(a) to (1)(e) set out the specific circumstances where a planning authority may decline to determine an application for listed building consent.
77. Section 10A(2) clarifies that an application for listed building consent is taken to be similar to another such application if the listed building and works to which the applications relate are in the opinion of the planning authority the same or substantially the same.
78. Subsection (2) of section 20 allows for an appeal to be made to the Scottish Ministers where the planning authority have failed to give notice to a person applying for listed building consent that they have declined to determine the application under the power in section 10A.

***Section 21 – Hearings in connection with applications for listed building consent and appeals***

79. **Section 21** removes the requirement to hold a hearing before determining applications and appeals under the 1997 Act. This provision amends the 1997 Act to bring the equivalent processes into line with those in the Town and Country Planning (Scotland) Act 1997 as amended by the Planning etc. (Scotland) Act 2006. Paragraph (a) repeals subsection (4) of section 11 (reference of certain applications to the Scottish Ministers) of the 1997 Act. Paragraph (b) repeals certain provisions of Schedule 3 to the 1997 Act relating to the determination of certain appeals by persons appointed by the Scottish Ministers and certain appeals by the Scottish Ministers which, but for a direction under paragraph 3(1), would fall to be determined by an appointed person.

***Section 22 – Enforcement notice: requirement to cease works***

80. **Section 22** amends section 34 (power to issue enforcement notice), section 35 (appeal against listed building enforcement notice), section 39 (offence where listed building enforcement notice not complied with) and section 40 (effect of listed building consent on listed building enforcement notice). The amendments allow a listed building enforcement notice to specify any works which the planning authority or the Scottish Ministers require to cease and/or to specify steps which must be taken, and makes the necessary amendments following on from this to the enforcement process.

***Section 23 – Stop notices and temporary stop notices***

81. **Section 23** inserts new sections 41A to 41I into the 1997 Act giving local authorities the power to serve stop notices and temporary stop notices in relation to unauthorised works on a listed building.

***New section 41A – Stop notices***

82. Subsections (1) and (2) set out the circumstances in which local planning authorities may issue a stop notice. In so doing local planning authorities must consider it expedient for the works to cease before the expiry of the period for compliance with a listed building enforcement notice.
83. Subsections (2) and (4) provide the power to serve a stop notice prohibiting the execution of “relevant works” and make it clear that a stop notice may be served at the same time as or after a copy of the listed building enforcement notice has been served but may not be served after the listed building enforcement notice has taken effect.
84. Subsection (3) of new section 41A clarifies that “relevant works” refers to the “works” that the local planning authority require to cease under the terms of the enforcement notice together with any associated works.
85. Subsection (5) sets out that a stop notice must specify the date that it is to come into effect. The date must not be earlier than 3 days (unless the planning authority consider there are special reasons for specifying an earlier date) after the date, nor later than 28 days from the date, when the notice is served.
86. Subsection (6) sets out that the local planning authority may serve the notice on any person who appears to them to have an interest in the building or is executing or causing to be executed the relevant works specified in the listed building enforcement notice.
87. Subsection (7) allows local planning authorities to withdraw a stop notice at any time by notice which must be served on all persons who were served with the stop notice. It also sets out that the notice withdrawing the stop notice must be displayed for 7 days in place of all or any site notices publicising a stop notice.

### **New section 41B – Stop notices: supplementary provisions**

88. New section 41B sets out supplementary provisions relating to stop notices. Subsections (1) and (2) set out the circumstances in which a stop notice ceases to have effect. Subsection (4) sets out how the planning authority may publicise the serving of a stop notice by displaying a site notice and provides what such a notice must state.

### **New section 41C – Power of the Scottish Ministers to serve stop notice**

89. New section 41C allows Scottish Ministers to serve a stop notice under section 41A. It clarifies that notices so served have the same effect as those served by a local planning authority and that provisions of the Act relating to stop notices apply to those served by Scottish Ministers as they apply to those served by the planning authority. Scottish Ministers may serve a stop notice either where a planning authority have issued an enforcement notice or where Scottish Ministers themselves have issued the enforcement notice.
90. Subsection (3) makes it clear that Scottish Ministers must consult the planning authority before issuing a stop notice.

### **New section 41D – Compensation for loss due to stop notice**

91. Subsection (1) sets out that a person with an interest in the building is entitled to compensation in respect of any loss or damage that can be attributed to the prohibition in the stop notice. Compensation is also payable where works prohibited by the stop notice cease to be “relevant works” (within the meaning of section 41A(3)) as a result of a variation of the listed building enforcement notice. For the purposes of determining if compensation is payable a stop notice is taken to have ceased to have effect in the circumstances specified in subsection (3). Essentially these are when the stop notice is withdrawn or the associated enforcement notice is quashed, withdrawn, or varied. Subsection (6) provides that the compensation that may be payable under this section includes any sum payable in respect of a breach of contract caused by taking action necessary to comply with the stop notice. No compensation is, however, payable in the circumstances set out in subsection (7). Subsection (8) provides that any question of disputed compensation shall be referred to and determined by the Lands Tribunal.

### **New section 41E – Penalties for contravention of stop notice**

92. New section 41E sets out the circumstances in which a person is guilty of an offence for contravening a stop notice and makes provision in relation to the contravention and the offences including allowing for conviction to be made for any number of offences with reference to different days or periods. Subsection (6) sets out the applicable penalties, and subsection (7) imposes a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the execution of the works which constituted the offence.

### **New section 41F – Temporary stop notices**

93. New sections 41F to 41I cover the operation of the new system of temporary stop notices.
94. In new section 41F subsection (1) sets out the circumstances in which planning authorities may issue temporary stop notices. The planning authority has to consider that the works to a listed building are unauthorised or fail to comply with a condition attached to consent and consider there is a reason for stopping the works immediately having regard to the effect of the works on the character of the building as one of special architectural or historic interest.

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95. Subsection (2) requires a notice to be in writing and to specify the works in question, prohibit execution of the works and set out the planning authority's reasons for issuing the notice.
96. Subsection (3) states that notice may be served on a person who either appears to be executing, or causing to be executed the works and/or a person who has an interest in the building.
97. Subsection (4) states that the planning authority must display a copy of the notice and a statement on the effect of section 41H (relating to offences) on the building in question.
98. Subsections (5) to (7) sets out when the notice starts and ceases to have effect. It may have effect for a maximum of 28 days.
99. Subsection (8) provides that if the notice is withdrawn before the end of the 28 day period (or specified shorter period), it ceases to have effect at that point.

**New section 41G – Temporary stop notices: restrictions**

100. In new section 41G, subsection (1) enables regulations to be made prescribing types of work the execution of which is not prohibited by a stop notice; and subsection (2) prohibits the issue of further temporary stop notice unless another form of enforcement action has been taken e.g. the service of an enforcement notice.

**New section 41H – Temporary stop notices: offences**

101. In new section 41H subsections (1) to (4) set out the circumstances in which a person is guilty of an offence for contravening a temporary stop notice and allow for conviction to be made for any number of offences with reference to different days or periods.
102. Subsection (5) sets out the statutory defences under this section, which are that the notice was not served on the accused and that he did not know, and could not reasonably have known, of its existence.
103. Subsections (6) and (7) set out the penalties for offences under these new sections, including a requirement for the court to have regard to any financial benefit which might accrue to the convicted person as a result of the activity which constituted the offence.

**New section 41I – Temporary stop notices: compensation**

104. In new section 41I subsection (1) sets out who is entitled to compensation in respect of any loss or damage which can be directly attributed to the prohibition in the notice. Subsection (2) limits the entitlement to compensation to particular circumstances. These are that the works in the notice are authorised by listed building consent granted on or before the date the temporary stop notice is first displayed and/or the planning authority withdraws the notice other than following such grant of listed building consent. Subsection (3) applies subsections (5) to (9) of new section 41D to compensation under this section. Any question of disputed compensation will be referred to and determined by the Lands Tribunal.
105. Subsection (2) of section 23 amends section 66 of the 1997 Act, which relates to the control of works affecting unlisted buildings in conservation areas, to provide that sections 41A to 41I of that Act (as inserted by this Act) apply in relation to such buildings as they apply in relation to listed buildings. This ensures that stop notices and temporary stop notices will be available as enforcement tools in relation to unlisted buildings in conservation areas where subsection (3) of section 66 applies.
106. Subsection (3) of section 23 amends section 76 of the 1997 Act to give persons duly authorised by a planning authority rights of entry for certain purposes. The purposes are to enable such persons to ascertain whether a listed building enforcement notice, stop notice or temporary stop notice has been compiled with, or whether any offence

in relation to any building under new sections 41E or 41H of the 1997 Act has been committed. The subsection also confers rights of entry in connection with the display of certain notices under the Act.

***Section 24 – Non-compliance with listed building enforcement notice: fixed penalty notice***

**New section 39A – Fixed penalty notice where listed building enforcement notice not complied with**

107. **Section 24** inserts new section 39A into the 1997 Act. This establishes powers for planning authorities to issue fixed penalty notices as an alternative to prosecution in cases where a person is in breach of a listed building enforcement notice provided the conditions set out in subsection (9) are met. The conditions in subsection (9) are that the fixed penalty notice must be issued within 6 months of the failure to comply with the listed building enforcement notice, and that a fixed penalty notice cannot be issued where a person has already been charged with an offence in respect of the breach of the listed building enforcement notice.
108. Subsections (6) and (7) set out that a person who receives a fixed penalty notice has 30 days to pay the penalty, and that the penalty is reduced by 25% if payment is made within 15 days.
109. Subsection (12) provides that any payment received by a planning authority in respect of a fixed penalty notice is retained by the authority.
110. Subsection (13) allows Scottish Ministers to prescribe in secondary legislation different levels of fine for different cases. This will also allow Ministers to set out in regulations an incremental scale of fines related to previous breaches of listed building enforcement notices relating to the same steps or works.

***Section 25 – Urgent works to preserve unoccupied listed buildings***

111. **Section 25** amends section 49(3) of the 1997 Act to specify, as an additional example of the types of works which may be carried out where works appear to be urgently necessary for the preservation of a listed building, preventative works to limit any deterioration of the building.

***Section 26 – Liability of owner and successors for expenses of urgent works***

112. **Section 26** inserts new sections 50A to 50G into the 1997 Act. These new sections will enable a notice of liability for expenses to be registered in the appropriate property register against a listed building.

**New section 50A – Liability of owner and successors for expenses of works executed under **section 49****

113. New section 50A deals with the apportionment of liability for the expenses of urgently necessary works for the preservation of a listed building when a property is sold. It makes it clear that an owner does not cease to be liable when he or she ceases to own a property. Subsection (1) provides that an owner will remain liable for relevant costs after the property has been sold.
114. Subsection (2) deals with the liability of an incoming or “new” owner of a property. A new owner is severally liable with the outgoing owner. If there are further new owners, both or all are bound. This is, however, subject to the provisions of subsection (3) which provides that an incoming owner will be liable for the cost of any urgent works which have been carried out prior to the date on which the new owner becomes the owner of the property only if a notice of liability for expenses has been registered in the property registers (on or before a date 14 days prior to the new owner becoming the owner)

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and the notice has not expired before that date or that a notice of renewal has been registered and has not expired. Liability for the cost of completed urgent works where no notice has been registered is thus excluded. In other words, if no notice is registered, the purchaser is not liable. Where a notice is registered, then a new owner would be liable for the full amount of the cost of the urgent works as described in the notice.

115. Where the new owner pays any relevant costs, under subsection (8) they may recover the amount paid from a former owner, if the former owner is liable.

**New section 50B – Notice of liability for expenses: further provision**

116. Subsection (1) of new section 50B sets out who may register a notice of liability for expenses and provides that a notice may be registered in relation to different works executed on a listed building. A notice will expire after 5 years, though it may be renewed.
117. Subsection (2) provides that the Keeper of the Registers of Scotland will not be required to determine whether or not the information contained in a notice of potential liability for expenses is accurate.

**New section 50C – Notices of renewal**

118. Subsection (1) sets out that a notice of renewal may be registered only when a notice of liability for expenses has been registered and has not expired.
119. Subsection (2) provides Scottish Ministers and planning authorities with the power to register a notice of renewal in a form prescribed under inserted section 50G.
120. Subsection (3) allows for a second or subsequent notice of renewal to be registered in respect of the same expenses and works as specified in the original notice of liability.
121. Subsection (4) sets out that a second or subsequent notice of renewal cannot be registered if a notice of renewal for expenses has expired.
122. Subsection (5) makes it clear that where a notice of liability for expenses has been registered by Scottish Ministers a notice of renewal may be registered only on application of Scottish Ministers. Subsection (5) also makes it clear that where a notice of liability for expenses has been registered by a planning authority a notice of renewal may be registered only on application of that authority.
123. Subsection (6) states that a notice of renewal expires after a period of 5 years.
124. Subsection (7) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of renewal is accurate.

**New section 50D – Notice of determination following representations under section 50**

125. Subsection (1) makes it clear that subsections (2) and (3) apply only where a notice of liability of expenses or a notice of renewal has been registered and the owner has made representations to the Scottish Ministers under the terms of section 50(4) of the 1997 Act or section 50(6) of the 1997 Act as inserted by section 26(2) of this Act.
126. Subsection (2) sets out that when a notice of liability has been registered by a planning authority the authority must apply to register a notice of determination in a form prescribed under new section 50G as soon as practicable after the Scottish Ministers have given notice of their determination under the terms of section 50(5).
127. Subsection (3) sets out that when the original notice of liability has been registered by Scottish Ministers they must apply to register a notice of determination as soon as practicable after they have made their determination.

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128. Subsection (4) sets out that a notice of determination must specify the amount recoverable in connection with a notice of liability for expenses.
129. Subsection (5) makes it clear that when the amount recoverable as set out in a notice of determination is less than the amount specified as the expenses of the works set out in the original notice of liability the amount specified in the notice of determination is to be treated as the amount recoverable.
130. Subsection (6) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of determination is accurate.

**New section 50E – Discharge of notice of liability for expenses and notice of renewal**

131. Subsections (1)(a) and (b) clarify that subsections (2) and (3) apply only when a notice of liability for expenses or a notice of renewal have been registered and any liability for expenses under section 50(2) has been fully discharged.
132. Subsection (2) states that when a planning authority has registered the original notice of liability for expenses the authority must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.
133. Subsection (3) states that when Scottish Ministers have registered the original notice of liability for expenses they must register a notice of discharge in a form prescribed under section 50G stating that the liability has been fully discharged.
134. Subsection (4) confirms that, when registered, a notice of discharge discharges a notice of liability for expenses or, where applicable, a notice of renewal.
135. Subsection (5) makes it clear that the Keeper of the Registers of Scotland will not be required to determine whether or not the information in a notice of discharge is accurate.

**New section 50F – Meaning of “register” in relation to notices**

136. Section 50F defines what is meant to ‘register’ a notice of liability for expenses, a notice of renewal, a notice of determination and a notice of discharge. For the purposes of the 1997 Act, ‘registration’ is effected when the information in the notice is registered in the Land Registers of Scotland, or where appropriate, where the notice itself is recorded in the Register of Sasines.

**New section 50G – Power to prescribe forms**

137. Section 50G gives the Scottish Ministers power to prescribe the forms of notices for liability for expenses, notices of renewal, notices of determination and notices of discharge.

***Section 27 – Recovery of grants for preservation etc. of listed buildings and conservation areas***

138. [Section 27](#) amends sections 52 and 70 of the 1997 Act which enable the Scottish Ministers and planning authorities to recover grants made under sections 51 and 69 of that Act. Section 51 is also amended (by subsection (2)) to enable planning authorities to impose conditions in grants.
139. These new provisions mean that Scottish Ministers and planning authorities can specify in a grant award letter the amount that would be recoverable (or set out the terms for calculating the amount that would be recoverable) when a condition of grant is either contravened or not complied with, or in the event the property is disposed of.

***Section 28 – Provisions that do not bind the Crown***

140. **Section 28** amends section 73A of the 1997 Act to ensure that new sections 41E, 41H and 50A(2) do not bind the Crown.

***Section 29 – Regulations in connection with inquiries, etc***

141. Section 79(1) of the 1997 Act applies various provisions of the Town and Country Planning (Scotland) Act 1997 (“the TCPS Act”) for the purposes of the 1997 Act including the power to hold inquiries under section 265 of the TCPS Act. Section 52 of the Planning etc. (Scotland) Act 2006 introduced a new section 275A into the TCPS Act which enables the procedure to be followed in such inquiries to be set by regulations made by the Scottish Ministers.
142. **Section 29(1)** of the Act inserts a reference to the new section 275A into section 79(1) and so will enable such regulations to be made in relation to inquiries held under the 1997 Act.
143. **Section 29(2)** of the Act removes the power to make rules under the Tribunals and Inquiries Act 1992 for inquiries held under Schedule 3 to the 1997 Act.

***Section 30 – Regulations and orders under the 1997 Act***

144. Subsections (2) and (5) amend subsections (2) and (4) of section 82 of the 1997 Act and confirm that the power to make regulations and orders under the 1997 Act may be exercised to make different provisions for different purposes.
145. Subsection (4) inserts a new section 3A into section 82 of the 1979 Act to provide that a statutory instrument containing regulations prescribing the fixed penalty amounts made by virtue of section 39A(5) is subject to affirmative procedure in the Scottish Parliament.
146. Subsection (6) confirms that any regulation or order making powers conferred by the 1997 Act include power to make any incidental, supplemental, consequential, transitory, transitional or saving provision that Scottish Ministers consider necessary or expedient.