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Compulsory Acquisition

1 Introduction

The Planning and Housing Acts contain a number of provisions that allow local authorities to acquire buildings at risk compulsorily. This can be an action of last resort where a listed building or building in a conservation area is not being properly preserved and an effective technique for ensuring that a property is transferred to more sympathetic hands. Despite their availability, compulsory purchase (CPO) powers are not deployed as extensively as they might be and the Scottish Government has taken steps to promote better understanding of their use.¹ The potential of compulsory purchase in buildings at risk cases is covered here.

2 The Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997

Under sections 42, 43 54 and 55 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 planning authorities and Scottish Ministers are empowered to initiate proceedings to acquire compulsorily listed buildings that are not being properly conserved, following service of a Repairs Notice (Toolkit text 13 *The Repairs Notice*). Ecclesiastical buildings in use as such, subject to variation of the current exemption by order, and scheduled ancient monuments are exempt from compulsory acquisition. Also, this does not apply to unlisted buildings in conservation areas, or to Crown property. The procedure for compulsory purchase is set out in the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 and the forms to be used are prescribed in the Compulsory Purchase of Land (Scotland) Regulations 1976 (SI 1976/820).

Once the specified period (minimum two months) after service of a Repairs Notice has expired, the planning authority is entitled at any time to make the CPO. Councils should note that certain additional paragraphs are required to be included in the form of notice sent out to interested parties where a listed building is the subject of the order. A Compulsory Purchase Order made by a planning authority requires Scottish Ministers' confirmation in the usual way.

In seeking Scottish Ministers' confirmation of the CPO the council will need to demonstrate that reasonable steps have not been taken for properly preserving the building and that acquisition is for a conservation objective rather than for demolition. There is, however, no guidance as to how far at this stage the owner should be expected to have complied with the Repairs Notice.

¹ <http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/ComPur>

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The basic test would be whether the owner has demonstrated a clear intention to undertake the works specified in the notice and has progressed as far as reasonably possible. Within the period specified in the notice it would be reasonable to expect:

- Written confirmation of the owner's intention to comply fully with the works specified in the notice;
- A time scale for their implementation;
- A letter of instruction to a professional and/or contractor to implement the works; and
- A copy of the specification for approval.

The Repairs Notice may prompt the owner or another party such as a prospective purchaser, to make applications for planning permission or listed building consent for more extensive refurbishment works or conversion to a new use. While this may be a genuine and positive response they should be treated in parallel as discrete issues in view of the potential for causing delay, the matter of compliance with the Repairs Notice (and whether or not to make a CPO) and any negotiations concerning the development proposals.

At the same time as serving notice of the making of a CPO, a copy of a Statement of Reasons for making the CPO must be served. In most cases this will form the basis of the Statement of Case which will have to be submitted in advance of the CPO public inquiry.

The Compulsory Purchase Order may include, in addition to the building, any neighbouring land required for preserving the building or its amenities, or for giving access to it for its proper control or management. The extent and boundary of the designation of this land requires a degree of care as it is open to Scottish Ministers to reduce the amount of land when confirming the CPO, but not to increase it.

Blackburn House, West Lothian

When pursuing possible compulsory purchase of this listed building via a Repairs Notice with a view to transfer of the property to a trust for restoration, the council identified a surrounding zone of land which it determined would be the minimum necessary to allow proper access, full restoration of missing parts and the protection and subsequent enhancement of the building's setting. Although the transfer was eventually undertaken by agreement rather than compulsory acquisition the land within the proposed boundary was transferred.

Anyone having an interest in a building on which a Compulsory Purchase Order has been made under this section may apply to the sheriff within 28 days after the service of the CPO notice for an order prohibiting further proceedings on it. If the sheriff is satisfied that reasonable steps have been taken to preserve the building, an order prohibiting further proceedings may be made. There is a right of appeal against the sheriff's decision to the Court of Session, but on a point of law only.

Before confirming a Compulsory Purchase Order, Scottish Ministers must be satisfied that the building ought to be preserved and that it should be compulsorily acquired for that purpose. Scottish Ministers must also have regard to objections to the order made in writing. Where the objection is not one which may be disregarded and is made by a statutory objector, Scottish Ministers are required to afford the objector an opportunity to appear before and to be heard at a public local inquiry or, if the objector agrees, at an informal hearing.

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Any person whose building is compulsorily purchased is entitled to compensation in the normal way. In assessing the compensation payable on compulsory acquisition of a listed building, it should be assumed that listed building consent would be granted for any works of alteration or extension. Consent to demolish cannot, however, be assumed. This exclusion avoids the possibility that an authority wishing to compulsorily acquire a listed building in order to preserve it might nonetheless have to pay a redevelopment value which could not have been realised in the open market.

If consent for works has been refused by Scottish Ministers or granted subject to conditions, then in assessing the compulsory purchase compensation it is not to be assumed that consent for such works would be granted. Again, this is to avoid double compensation in respect of the same restriction.

Under section 45 of the Act a planning authority that is satisfied that a listed building has been deliberately allowed to fall into disrepair in order to justify its demolition and the redevelopment of the site can, when making a Compulsory Purchase Order, make a 'direction for minimum compensation'. The effect of such a direction is that in assessing the compensation to be paid it is assumed that neither planning permission nor listed building consent would be given for any works to the building except those for restoring it to, and maintaining it in a proper state of repair. In other words, all development value is excluded. In one case in England where the owner of a listed cemetery failed to maintain it compensation of £1 was determined.

If a planning authority makes an application for a direction of this sort, it must include a statement that it has done so in the statutory notice which it is required to serve on the owner, lessee or occupier. The statement must contain an explanation of the meaning of the term 'direction for minimum compensation'.

If a direction for minimum compensation is made, any person with an interest in the building may, within 28 days of the service of the notice apply to the sheriff for an order that the direction for minimum compensation be reversed. If the sheriff is satisfied that the building has not been deliberately allowed to fall into disrepair for the purpose mentioned, the order must be made. There is a right of appeal to the Court of Session against the decision of the sheriff, but on a question of law only. In the case of such an application it will be necessary to demonstrate that there has not been any deliberate neglect. Whether the owner applies to the sheriff or not, however, Scottish Ministers' confirmation of the Compulsory Purchase Order is needed before the minimum compensation provision takes effect.

Minimum compensation should be sought only where there is clear evidence of such an intention. In practice, deliberate neglect may be difficult to establish. The fact of dereliction may be insufficient in itself to demonstrate a deliberate intent by the owner to bring about the building's demise. A request for a direction of minimum compensation will be considered as a separate issue by Scottish Ministers and will not prejudice a case for confirming the CPO. Where the authority believes that there has been deliberate neglect of the property then it will need to present a cogent case. The relevant factors might include:

- Any history of refusal of planning permission and listed building consent for schemes involving the demolition of the listed building;

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- Any unsubstantiated claims that the retention of the listed building would be uneconomic;
- A record of persistent failure by the owner to keep the building secure, weathertight and structurally stable, necessitating action by the council including urgent works under section 49 of the Planning (listed buildings and Conservation Area) (Scotland) Act 1979 and/or works under other provisions;
- Application to Scottish Ministers seeking removal of the building from the Statutory List of Buildings of Special Architectural or Historic Interest;
- Unauthorised alterations to the building which adversely affect its character; or
- Damage other than casual vandalism that appears to be deliberately intended to hasten deterioration or cause structural instability.

Example: Arnos Vale Cemetery, Bristol

The City Council served a Compulsory Purchase Order to acquire this historic cemetery before transferring management to the Arnos Vale Cemetery Trust. The project was subsequently awarded £4.8m of funding from the Heritage Lottery Fund towards repair and restoration costs.

Arnos Vale Cemetery is included in English Heritage's register of historic parks & gardens (grade II*). It contains a number of designated heritage assets. The site came to the attention of the local community in the 1980s when, due to the failing commercial viability of the cemetery, the owner of the site declared an intention to develop part of the site for residential use. Following a high-profile media campaign, Bristol City Council served a Compulsory Purchase Order and took ownership in 2003. The Arnos Vale Cemetery Trust (AVCT) was subsequently awarded a licence to manage the site and kept it open during a major restoration programme. Arnos Vale Cemetery was re-launched in May 2010. Key elements of the restoration project include the repair and conversion of one of the lodge buildings into a shop and visitor centre. An education project was also developed along with site interpretation, tours, talks and ticketed events. This allows for revenue to be generated towards the project's costs and for the management of the historic landscape and its monuments.

In 2005 the Trust was awarded £4.8m from the Heritage Lottery Fund (HLF) towards the restoration of the Cemetery, covering 75% of the estimated costs. Linked to the HLF grant was the provision of a loan facility by the Architectural Heritage Fund. Match funding of approximately £600,000 has been raised by AVCT from a number of sources including charities, a dedicated friends group and individual donations. An approximate £250,000 worth of equivalent volunteer time was also given throughout the restoration period.²

Research into the use of Repairs Notices in England has shown that only a small number of initiated cases lead eventually to compulsory purchase. The English survey showed that many cases are either resolved or dropped prior to the formal submission or confirmation of the order. This might also appear to be the case in Scotland, based on the limited number of confirmed cases listed in the following table supplied by Historic Scotland, although just how many Scottish others had actually been commenced is not known.

² http://www.arnosvalefriends.org.uk/future_new1.htm

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Address	Council	Date of Order	Date of Confirmation	Months elapsed
81-83 Lanark Road, Crossford	South Lanarkshire	06/02/1980	09/04/1981	13
49, Westbourne Gardens	Glasgow City Council	04/03/1985	24/04/1985	1.5
13, Landsdowne Crescent, Glasgow	Glasgow City Council	20/06/1985	29/08/1985	2
59 Hardgate/2 Cherry Bank, Aberdeen	Aberdeen City Council	20/06/1985	29/05/1986	11
The Battlefield Rest, Glasgow	Glasgow City Council	15/12/1986	05/07/1988	18
141-45 High Street, Newburgh	Fife Council	05/09/1989	13/08/1990	11
Manswrae Farm, Bridge of Weir	Renfrewshire Council	19/02/1999	Not confirmed 3/7/2007	
21-25 Union Street, Dundee	Dundee City Council	13/03/2000	25/04/2002	25
Anchor Mills, West Gatehouse, Paisley	Renfrewshire Council	30/05/2001	Withdrawn - 14/08/2002	
25-35 Main Street, Newmilns	East Ayrshire	22/06/2001	Unknown - file missing	
Balintore Castle, Angus	Angus Council	20/04/2005	21/03/2006	11
Mid Dykebar, Grahamston, Paisley	Renfrewshire Council	27/06/2007	24/09/2007	3
Art Caput, Boyndie, Banff	Aberdeenshire Council	31/03/2006	11/06/2008	13
30 Princes Street and 7 Sir John's Square, Thurso	Highland Council	01/04/2009	12/11/2012	43
Sunnybrae Lodge, Walkerburn	Scottish Borders Council	11/12/2012		

The table shows that the average time from the date of an order to confirmation is greater than 24 months. The period after the serving of the order is an opportunity for further negotiation with the owner.

If the owner starts work after the CPO is made and the authority is satisfied that genuine progress is being made, then it may be appropriate to ask the Scottish Ministers to adjourn the public inquiry. Also, the CPO can be withdrawn at any time.

Local authorities are nervous about pursuing action via a Repairs Notice for a number of reasons including the time and resources taken, a lack of confidence and experience in such matters, the lack of a clear strategy for reuse of the building or a general fear that they may end up taking ownership of an expensive liability.

Example: 30 Princes Street, Thurso, Highland

This Category B listed town house in a highly public location in the town had given rise to concern for some time. A CPO was confirmed in late 2012 and the council is still considering the future of the property with interest from Highland Building Preservation Trust.

Case Study: Sunnybrae Lodge, Walkerburn, Scottish Borders

This background to this Compulsory Purchase Order made in December 2012 is featured in Toolkit text *18 Case Studies*.

3 The Planning (Scotland) Act 1997

Under section 189 of the Act a local authority shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area which:

- Is suitable for and is required in order to secure the carrying out of development, redevelopment or improvement; and/or

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- Is required for a purpose that it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

These wide ranging powers provide a tool to help a local authority assemble land where this is necessary to implement development proposals. A local authority can use these powers for those purposes in order to assemble land for regeneration and other schemes where the range of activities or purposes it proposes means that no other single specific compulsory purchase power would be appropriate. A local authority can also use these powers to purchase an individual property in need of redevelopment or improvement, such as a derelict property or empty home.

The local authority need not propose to undertake that activity or achieve the purpose itself. Although a local authority has wide powers it might not necessarily have the resources needed to carry forward its scheme alone. For this reason, before it begins the compulsory purchase process an authority might appoint a preferred developer and enter into what is commonly called a 'back to back' agreement. The terms of these agreements vary but generally the local authority undertakes to use its compulsory purchase powers to acquire the land and dispose of it to the developer in return for the developer undertaking to carry out the development (at the developer's expense) and indemnify the local authority's costs. In this way the local authority can realise a scheme in the public interest that may otherwise not be possible. Conversely, a private developer can approach a local authority. A developer might be unable to assemble the land that it needs for a scheme that is clearly in the public interest. In this situation the developer can ask the local authority to use compulsory purchase to acquire the land that the developer needs to facilitate the development.

In some cases a local authority might decide to dispose of the property to a community group or other third party to carry out the authority's purpose.

In cases involving a private developer or other third party, Scottish Ministers will weigh up the public interest in the scheme against the concerns of the owners and others affected in the same way they would for any other CPO. However, Ministers have no role in approving the back to back agreement or the disposal to the developer or third party.

The local authority's Statement of Reasons should be as detailed as possible to show that there are no planning or other impediments to the implementation of the scheme. It may not always be feasible or sensible for a local authority to wait until the full details of the scheme have been worked up, and planning permission obtained, before it proceeds with the order. Also, in some cases the proposed acquisition might form part of a longer-term strategy that needs to be able to cope with changing circumstances. In such cases it may not be possible for the local authority to demonstrate with absolute clarity or certainty the precise nature of the end-use proposed for the particular areas of land included in any particular CPO. In such cases the local authority should justify the case for acquisition in advance of resolving all the uncertainties.

Scottish Ministers will consider a decision to confirm an order on its own merits. However, factors that Ministers will take into account are likely to include the following:

- Whether any planning permission is in place, the provisions of the National Planning Framework and Development Plan, so far as material and any other considerations that would be material in determining a planning application on the land;

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- The potential financial viability of the scheme for which the authority is acquiring the land. The acquiring authority must reassure Ministers that there is a reasonable prospect of the scheme going ahead. A general indication of funding intentions, and of any commitments from third parties, will usually suffice. However, the greater the uncertainty about the financial viability of the scheme, the more compelling the other grounds for undertaking the compulsory purchase will need to be. The timing of any available funding may also be important. For example, a local authority might argue that a strict time-limit on the availability of the necessary funding justifies proceeding with the order before it has finalised details of the scheme and/or the statutory planning position; and
- Whether the purpose for which the local authority is proposing to acquire the land could be achieved by any other means. This may include considering whether any alternative proposals put forward by others would be appropriate. It may also involve examining the suitability of any alternative locations for the purpose for which the land is being acquired.

Example: 16 Market Street, Mid Calder, West Lothian

In the 1990s, West Lothian Council were concerned that this roofless two-storey traditional cottage was having an adverse effect on the character of the Mid Calder Conservation Area and pursued compulsory acquisition in the interests of the proper planning of the area. On acquisition the property was marketed to a restoring purchaser who converted it in a manner sympathetic to the original building and conservation area to two dwellings for sale.

4 The Housing (Scotland) Act 1987

Section 10 of the Act enables the local authority to acquire property for, or in connection with, provision of housing accommodation. A local authority may use these wide ranging powers to assemble land for housing and ancillary development such as access roads, shops and recreation grounds and also to bring empty properties into housing use.

The acquiring authority should include in its Statement of Reasons information about the need for the provision of further housing accommodation in the area. Where appropriate, the authority should refer to Local Housing Strategies and Housing Needs and Demands Assessments. The authority should also provide information about its proposals for the property it seeks to acquire. If the authority proposes to dispose of the property, the authority should where possible submit information about the prospective purchaser and the purchaser's proposals to provide housing accommodation, including time scales for completion.

In some cases it may not be possible for the authority to identify a prospective purchaser at the time it makes a Compulsory Purchase Order. Negotiations may be proceeding or the authority may propose to sell the property on the open market. In such cases the authority should submit information about its proposals to dispose of the property; its grounds for considering that this will achieve the provision of housing accommodation; and when the provision will materialise.

The compulsory purchase of an **empty property** may be justified where there appears to be no other prospect of a property being brought back into residential use. However, the authority should first encourage the owner to restore the property to full occupation, where possible. If the acquiring authority cannot trace the owner, or if there is a clear need for the property to be

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restored to use, then proceeding with compulsory purchase powers may be the only way for the authority to acquire the property. When submitting an order for confirmation in such circumstances, the authority should tell Scottish Ministers how long the property has been vacant, what steps the authority has taken to encourage the owner to bring it into acceptable use, what the outcome was and whether the owner has carried out any works to re-use the property for housing purposes.

A local authority may also justify the compulsory purchase of **sub-standard properties** in some cases. For example, where the owner has failed to maintain it or bring it to an acceptable standard and where other measures, such as the service of statutory notices, have not achieved the authority's objective of securing the provision of acceptable housing accommodation. When submitting an order for confirmation, the acquiring authority should tell Scottish Ministers about the condition of the property, what other measures the authority has taken to remedy matters (such as the serving of statutory Notices), what the outcome was and the extent and nature of any works carried out by the owner to improve and repair the property.

If an empty property is derelict or in need of improvement it may be more appropriate in some cases for the authority to use the powers in section 189 of the Town and Country Planning (Scotland) Act 1997.

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Example: 222 High Street, Leslie, Fife

This CPO of a derelict listed house in a conservation area was confirmed in 2013.

The Reporter's site inspection confirmed the council's description of it as derelict, and clearly it had been unoccupied for a lengthy period. Some windows are boarded up, some broken, and rhones and chimney head are in a poor state of repair. The walls appear to show rising damp. He was unable to gain internal access, but do not consider this necessary to confirm the state of the property. The garden was partially filled with rubbish and waste material, including a scrap car. A makeshift security fence and sign deterred entry.

In support council offered a number of development plan policies and supporting text including:

- Structure Plan references to the rich and varied built environment, which requires to be improved, and the strategy to enhance the character of its towns and villages;
- Structure Plan emphasis on the importance of preserving historic assets, including listed buildings;
- Structure Plan promotion of the use of brownfield land within settlements to assist delivering regeneration;
- Local Plan policy regarding the importance of safeguarding conservation areas;
- Local Plan policy promoting the re-use of buildings; and
- Scottish Planning Policy regarding the protection of the historic environment, listed buildings and conservation areas.

From the inspections it was clear that the property was very seriously dilapidated and not capable of reasonable habitation. The house lacked maintenance and was partially open to the elements. It was potentially liable to rot and other decay, with the possibility of this crossing the gable to the adjoining property to the east. The state of the house clearly detracted from the street scene within the conservation area and the state of the garden ground detracted very seriously from the residential amenity of neighbouring properties, as well as the general scene.

It was found that the council was correct to pursue the Order as the only practicable way forward to ensure the restoration and occupation of the property.

There are other housing provisions which can enable compulsory purchase including section 88 of the Housing Associations Act 1985 which allows acquisition for the purpose of selling or leasing property to a registered housing association or unregistered self build society; or providing dwellings for letting or for sale or hostels.

Where they are in place, council Empty Homes Officer can be a useful ally of those charged with buildings at risk issues where residential property or buildings with potential for use as housing is involved. Empty Homes Officers have developed effective approaches for identifying and contacting owners and generally have a good working knowledge of housing-relevant funding opportunities. Empty Homes Officers can also assist in building and adding weight to a case for action, including compulsory acquisition, particularly where a case can be related to the local housing strategy.

5 The End Use Strategy

Whatever legislative route is taken towards CPO it is important that there is a strategy for repair and/or disposal of the property. In confirming a CPO Scottish Ministers will need to be satisfied that the means and resources necessary for securing the building's repair will be available. Where the council does not intend to undertake the repair of the building itself consideration should be given to identifying a suitable end purchaser to acquire the building as soon as possible after acquisition.

An initial valuation of the property will be crucial in informing the strategy. This is particularly important where the property is likely to have a significant negative value (i.e. the repair costs exceed its estimated value on repair) in which case one of the key elements in support of the case in seeking confirmation of a CPO will be the means of funding the 'conservation deficit'.

It is essential that the valuer is briefed properly to ensure that full consideration is given to all the issues affecting the listed building. These might include:

- The relevant legislation
- The planning policy context
- Any planning brief
- Current approvals
- Appropriate uses
- Any opportunities for extension/new building, parking etc.
- The estimated repair costs
- Any other relevant factors

The valuer will then need to consider:

- The optimum use of the building compatible with its historic interest, character, setting and relevant planning policies
- The marketability of the property including whether it could be marketed in its current state or will it require a specialist purchaser/restorer such as a building preservation trust with an assembled funding package or a back to back deal
- Any relevant land to be included in a CPO
- The estimated open market value of the property
- The estimated open market value of the property in a repaired state
- The estimated level of compensation under the CPO

6 The Back to Back Deal

The council can resell the acquired property to any individual, company or developer. It could be advertised for sale as a restoration project subject to conditions of restoration and subsequent maintenance. The council might wish to develop acceptable proposals for the property and site and adopt these through consents or published briefs. However, in many situations transfer to a building preservation trust will be the most realistic option for the final acquisition and restoration of the building at risk. This can be strategically planned in advance including a 'back

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to back' deal to pass the building to a restorer. The English Heritage guide *Stopping the Rot* contains a sample³ back to back agreement which outlines the scope of such a contract.

Conservation Officer Paul Sutton has written the following suggested sequence for proceeding with a Repairs Notice involving a back to back deal based on experience of his local authority:

Epping Forest District Council, Essex, Repairs Notice with back to back deal sequence⁴

- Prepare full repairs schedule for building (together with likely costs/builders tenders etc);
- Obtain realistic assessment of market value of building and site (existing condition) but including any existing planning consents. Local agents or in-house valuer are useful here;
- Obtain estimates of likely value of property in habitable condition (including any consents). Again see local agents or in-house valuer;
- Produce financial feasibility (and/or residual valuation) based on 1-3 above;
- Seek potential purchaser interested in 'back-to-back' deal (Conservation Officers are often aware of interested parties through Buildings at Risk registers, for example);
- Prepare full repairs notice;
- Prepare legal agreement to ensure that prospective purchaser will proceed with deal if Compulsory Purchase Order is confirmed;
- Seek approval of relevant committee(s) to service of repairs notice (and CPO);
- Serve repairs notice on owner of building;
- If no action on part of owner within reasonable period (up to three months), prepare Compulsory Purchase Order and re-confirm third party interest;
- Serve Compulsory Purchase Order and complete legal agreement with prospective purchaser;
- Await owners' actions (possible appeal against CPO will result in Public Inquiry);
- Await confirmation of CPO; if confirmed, proceed with acquisition and 'back-to- back' deal;
- Property acquired and disposed of to prospective purchaser simultaneously;
- New owner carries out full repairs to listed building in accordance with legal agreement.

³ Sample 15, pp. 90-97.

⁴ Paul Sutton 'Listed Buildings, Repairs Notices and Back-to-Back Deals' *Context* 43 pp. 9-10
http://ihbc.org.uk/context_archive/43/listed.htm

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The above guidance was prepared by The Architectural Heritage Fund for Historic Scotland and is published by the Buildings at Risk Register for Scotland as part of the Buildings at Risk Toolkit. <http://www.buildingsatrisk.org.uk/>

The text contains references to legislation and its interpretation that may contain inaccuracies or be out of date. Ensure you take appropriate professional advice before making decisions relating to property. Feedback, relevant case studies and suggested changes are welcomed.

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