

BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) ACT 2014

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Non-Government Bills Unit in order to assist the reader of the Buildings (Recovery of Expenses) (Scotland) Act 2014 (“the Act”). They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. The Act amends the Building (Scotland) Act 2003 (“the 2003 Act”) to provide the framework for local authorities to make charging orders for recovery of expenses incurred where local authorities have carried out work under the 2003 Act.
4. The principal reference points for the amendments to the 2003 Act are Part 3 (sections 25, 26 and 27) and Part 4 (sections 28, 29 and 30) of the 2003 Act, which deal, respectively, with matters concerning compliance and enforcement, and defective and dangerous buildings. It may therefore be useful, by way of context, to provide some detail on those sections.
5. In the 2003 Act, the term “building” has the meaning given in section 55 of that Act.
6. Under section 25 of the 2003 Act, where the Scottish Ministers consider that, for any of the purposes specified in subsection (1), those buildings to which building regulations apply ought to comply with a provision of the building regulations, they may direct local authorities to take action to secure that those buildings do comply. If required to do so by such a direction by the Scottish Ministers, the local authority must (and if not required to do so, the local authority may) serve on an owner of an identified building a “building regulations compliance notice” identifying the provision of the regulations with which the building does not comply, any particular steps the owner must take, when the notice takes effect and the date by which the building must be made compliant with the provision of the regulations. Where the owner has not complied with the notice, then under section 25(7)(b) the local authority can carry out any necessary work to secure compliance, and can recover from the owner any expenses reasonably incurred by it in doing so.
7. A verifier, appointed under section 7 of the 2003 Act, may impose a continuing requirement under section 22 of the 2003 Act on an owner of a building to ensure that, after completion of a building, the purposes of building regulations are not frustrated. Under section 2 of the 2003 Act, the Scottish Ministers can, by regulations, also impose a continuing requirement, including the imposition of such a requirement in respect of an existing building. Under section 26, where it appears to a local authority that

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the owner of a building is failing to comply with a continuing requirement imposed on the owner, the local authority can serve a “continuing requirement enforcement notice”, identifying the continuing requirement concerned, any particular steps the owner must take, when the notice takes effect, and the date by which the steps necessary to comply with the continuing requirement must have been taken. Where the owner has not taken the required steps to comply with the notice by the specified date, then under section 26(3)(b) of the 2003 Act the local authority can undertake any necessary work to secure compliance with the notice, and can recover from the owner any expenses reasonably incurred by it in doing so.

8. Under section 27, where it appears to a local authority that work which requires a building warrant has been carried out without, or not in accordance with, a building warrant or that a limited life building has not been demolished by the expiry of the period of its building warrant, the local authority can serve on the relevant person a “building warrant enforcement notice”. This must set out when the notice is to take effect. It can also set out the steps which are to be taken by the person on whom the notice is served to comply with it. In addition, where it appears to the local authority that work requiring a building warrant is being carried out without a building warrant (or, where a building warrant has been granted, not in accordance with that warrant) the notice can require the person on whom it is served to suspend work (other than work to comply with the notice) until the notice has been complied with. The term “relevant person” is defined in section 27(3) and includes the owner of the building. It might also include, for example, a tenant. Where the relevant person has not complied with the notice by the date specified in the notice, under section 27(7)(b) the local authority can carry out any necessary work to secure compliance with building regulations made under section 1(1) of the 2003 Act or the notice, and can recover from that person any expenses reasonably incurred by it in doing so.
9. **Section 28** enables a local authority to serve on the owner of a building a “defective building notice” requiring the owner to rectify such defects in the building as the notice may specify. The notice sets out the defects concerned, any particular steps the owner must take, and the dates by which the owner must have begun and completed the work required by the notice. Where the owner has not carried out the work, then under section 28(10)(b) the local authority can do so, and can recover from the owner any expenses reasonably incurred by it in doing so.
10. Where it appears to a local authority under section 29(1) that a building (a “dangerous building”) constitutes a danger to persons in or about it or to the public generally or to adjacent buildings or places then the local authority must carry out such work (including, if necessary, demolition) as it considers necessary to prevent access to it and to protect the public (subsection (2)). It can also recover from the owner any expenses reasonably incurred by it in doing so. Subsection (3) recognises that it may not be possible to give prior notice to the owner, and that the local authority may require to take urgent action. In that situation, it can also recover from the owner any expenses reasonably incurred by it in carrying out such work as is necessary to reduce or remove the danger.
11. In terms of section 29(6), the local authority must serve a dangerous building notice under that subsection except where the danger has been resolved in consequence of work carried out under section 29(3).
12. Section 30 of the 2003 Act sets out what is to be contained within a “dangerous building notice”, identifying the work for the repair, securing or demolition of the dangerous building which the local authority considers necessary to remove the danger, and the dates by which the owner must have begun and completed the work required by the notice. Where an owner has not carried out work by the dates specified for compliance under the notice, subsection (4) enables the local authority to carry out the required work and to recover from the owner any expenses reasonably incurred by it in doing so.

COMMENTARY ON SECTIONS

The structure of the Act

13. The Act has four sections. Section 1, which represents the main part, comprises insertions to the 2003 Act to make provision for charging orders under the 2003 Act. Section 2 allows for ancillary provision to be made by the Scottish Ministers. Section 3 deals with commencement and section 4 sets out the Act's short title.

THE ACT – SECTION BY SECTION

Section 1(a) – limitation on recoverable expenses

14. **Section 1(a)** amends section 44 of the 2003 Act. While, generally, the 2003 Act provides for a local authority to recover expenses for work carried out by them in connection with notices served or work carried out under that Act, section 44(2) restricts liability for expenses in certain circumstances. For example, where that person is not the owner but a trustee (or someone acting in any of the other capacities set out at section 44(2) (a)) and where the funds, rents and other assets held by that person are insufficient to meet the whole demand. Where this twofold test set out in section 44(2) is met, liability is limited to the total amount of funds, rents and other assets held by that person.
15. **Section 1(a)** extends this restriction on the general entitlement to recover expenses to charging orders where the person involved is acting in a similarly limited capacity. These matters are dealt with at section 1(a)(i) and (ii) of the Act, by means of adjustments to section 44(1) and 44(2)(b) of the 2003 Act, respectively.

Section 1(b) - charging orders

16. **Section 1(b)** contains the main provisions of the Act dealing with charging orders. It takes the form of insertion of several sections in Part 5 (General) of the 2003 Act, immediately after section 46. These sections cover the following matters: 46A (Charging orders); 46B (Qualifying expenses); 46C (Repayable amount); 46D (Charging order provision and early repayment); 46E (Registration); 46F (Liability of new owner); 46G (Continuing liability of former owner); and 46H (“Register” and “appropriate land register”).

46A – Charging orders

17. Under section 46A(1), a local authority entitled to recover any expenses under section 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) or 30(4)(b) which represent “qualifying expenses” (as defined in section 46B) can make a charging order. Section 46A(1) then sets out some of the basic elements of a charging order, namely that it is to specify the building concerned, the repayable amount calculated in accordance with section 46C, and is to provide that the building is charged with the repayable amount.
18. Section 46A(2) provides that charging orders, and discharges of charging orders, are to be in the form prescribed in regulations made by the Scottish Ministers under section 36 of the 2003 Act.

46B – Qualifying expenses

19. Section 46B(1) provides that “qualifying expenses” represent the expenses which are recoverable by local authorities from owners for works carried out under section 25(7) (b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3), or 30(4)(b) of the 2003 Act, and which relate to notices, or works without notice, referred to in paragraphs (a) to (e) of section 46B(1). Section 46B(1) further provides that expenses are recoverable only in respect of notices served, or works carried out, following commencement of new section 46B of the 2003 Act. Under section 3 of the Act, section 46B (along with the

other sections inserted into the 2003 Act by section 1(b) of the Act) will come into force six months after Royal Assent.

20. Section 46B(2) provides that in the event of a charging order being made for expenses incurred in demolishing a building, references to a building in sections 46A to 46G are to be read as references to the site of the demolished building.

46C – Repayable amount

21. Section 46C(1) provides that the repayable amount under a charging order is the lower of the two amounts set out at paragraphs (a) and (b) of section 46C(1). That is, (a) the total of the qualifying expenses (as defined in section 46B(1) as the expenses incurred by the local authority in carrying out works) together with any additional amounts recoverable under section 46C(2)); or (b) such amount as the local authority determines.
22. In addition to the qualifying expenses, local authorities may also recover other costs from the owner, as set out at section 46C(2). These cover registration fees for charging orders and discharges, administrative or other expenses incurred in that connection, and interest. The rate of interest can be varied, but must be reasonable.
23. Section 46C(3)(a) requires local authorities to determine the number of annual instalments in which the repayable amount is to be paid, which must be no fewer than 5 and no more than 30. Paragraph (b) provides that local authorities must also specify the date on which annual instalments are due.

46D – Charging order provision and early repayment

24. Section 46D(1) sets out certain matters that a charging order must provide for. It contains details of how the repayable amount under a charging order is to be paid, what happens where an instalment payment is missed, and makes provision for dealing with any outstanding balance due at the end of the instalment period.
25. Section 46D(1)(a) provides that a charging order must provide that the repayable amount under a charging order is to be paid in the number of annual instalments, on the same date each year, as determined by the local authority under 46C(3). Section 46D(1)(b) provides that where an annual instalment is not paid, then civil debt recovery procedures can be taken by the local authority to pursue recovery of that instalment, together with charging order fees and connected administrative or other expenses. Inserted section 46D(1)(c) provides that any outstanding balance remaining after the final instalment is due is similarly recoverable by means of civil debt recovery procedures.
26. A mechanism for early repayment of the repayable amount is provided for at section 46D(2). Firstly, section 46D(2) confirms that the owner of a building subject to a charging order can at any time redeem the repayable amount early by paying to the local authority the repayable amount in full. Further, an owner can redeem the repayable amount early if the owner can reach agreement with the local authority regarding the payment of a lower acceptable sum.

46E – Registration

27. Section 46E provides for charging orders and discharges to be registered. In particular it sets out the local authority's obligations in regard to registration in the "appropriate land register" (subsections (1) and (5)), and the effect of registration (subsections (3), (4) and (6)). It also clarifies (in subsection (2)) that a charging order can be registered during the 21 day period in which an appeal may be brought or, where such an appeal is brought, at any time before the appeal is withdrawn or finally determined. While under section 46E(4) a registered charging order can be enforced by the local authority against the owner of the charged building, that general position is subject to section 46F.

46F – Liability of new owner

28. Section 46F deals with the liability of a new owner of a building. Subsection (2) provides that the new owner is severally liable with any former owner for the repayable amount for which the former owner is liable under section 46C. However, this is only the case where a charging order has been registered in the appropriate land register at least 14 days prior to the new owner becoming the owner (subsection (1)(a) and (b)). If a charging order has not been so registered then the new owner is not liable.

46G – Continuing liability of former owner

29. Section 46G(1) provides that the liability of an owner of a building does not cease simply by virtue of that person no longer being the owner. If the new owner has paid the repayable amount, or any part of the repayable amount for which the former owner is liable to the local authority, then the new owner can recover that amount from the former owner (subsection (2)). This remains the case even if the new owner does not continue to own the building (subsection (3)).

46H – “Register” and “appropriate land register”

30. Section 46H(1) sets out the meaning of “register” and related expressions for the purpose of sections 46C to 46F. Section 46H(2) provides that reference to “appropriate land register” in relation to recording or registration of a charging order, or a discharge, means either registering in the Land Register of Scotland or recording in the Register of Sasines.

Section 1(c) – Appeals

31. Section 1(c) of the Act makes provision enabling charging orders to be appealed in certain circumstances. It does so by way of insertions to the existing appeal provisions in the 2003 Act, which are set out in section 47. Section 47(1) lists various actions under the 2003 Act (relating to specified decisions or notices) which, under section 47(3), an aggrieved person can appeal. Such appeals lie to the sheriff by way of summary application made within 21 days of the relevant decision or notice. Section 1(c)(i) and (ii) extend this appeal right to charging orders made under section 46A.
32. The right of appeal against a charging order is a limited one. Section 1(c)(iii) inserts a new subsection (3A) into section 47, and places certain restrictions on the right of appeal in relation to a charging order made under section 46A. Inserted subsection (3A) provides that questions cannot be raised about matters which might have been raised earlier on an appeal against the original notice or the decision requiring the execution of the works to which the charging order relates.
33. [Section 1\(c\)\(iv\)](#) amends section 47(4) to provide that a charging order does not take effect until the appeal period has elapsed or, where an appeal is brought within that period, the withdrawal or final determination of such an appeal.

Section 2 – Ancillary provision

34. This section enables the Scottish Ministers to make ancillary provisions in order to give full effect to anything contained in the Act. It includes power to make, by order, such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate. Under subsection (2), the power can be used to modify the Act itself or any other existing legislation (primary or secondary).
35. Subsection (3) provides that an order made under subsection (1) which adds to, replaces or omits any part of the text of an Act is subject to the affirmative procedure. Any other order is subject to the negative procedure by virtue of subsection (4).

Section 3 – Commencement

36. This section provides for commencement of the Act. The commencement section, together with section 4, which simply sets out the short title, come into force on the day after Royal Assent. The remaining provisions of the Act come into force 6 months after Royal Assent.

PARLIAMENTARY HISTORY

37. The following table sets out, for each stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates which the proceedings at that stage took place, and the references to the Official Report of those proceedings. It also shows the dates on which the Committee report and other papers relating to the Bill were published, and the references to those reports and other papers.

| <i>PROCEEDINGS AND REPORTS</i> | <i>REFERENCE</i> |
|--|---|
| | |
| INTRODUCTION | |
| | |
| Bill as introduced – 30 October 2013 | SP Bill 39–Session 4 (2013) |
| | |
| Stage 1 | |
| | |
| (a) Local Government and Regeneration Committee | |
| | |
| 28th meeting, 6 November 2013 | In private |
| 5th meeting, 19 February 2014 | Col 3105- 3124 |
| 6th meeting, 26 February 2014 | Col 3132-3159 |
| 8th meeting, 12 March 2014 | In private |
| | |
| Local Government and Regeneration Committee’s 4th Report, 2014 (Session 4): Stage 1 Report on the Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill | Report SP Paper 495 |
| | |
| (b) Finance Committee | |
| | |
| 28th meeting, 13 November 2013 | In private |
| 4th meeting, 5 February 2014 | In private |
| | |
| (c) >Delegated Powers and Law Reform Committee | |
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| PROCEEDINGS AND REPORTS | REFERENCE |
|--|-----------------------------|
| 31st meeting, 3 December 2013 | Col 1171 |
| 3rd meeting, 21 January 2014 | In Private |
| 10th meeting, 18 March 2014 | Col 1369 - 1370 |
| | |
| Delegated Powers and Law Reform Committee's 6th Report, 2014 (Session 4): Defective and Dangerous Buildings (Recovery of Expenses) (Scotland) Bill | Report SP Paper 457 |
| | |
| (d) Consideration by the Parliament | |
| | |
| Stage 1 debate – 3 April 2014 | Col 29818-29840 |
| | |
| Stage 2 | |
| | |
| (a) Local Government and Regeneration Committee | |
| | |
| 17th meeting, 4 June 2014 | Col3656 - 3668 |
| Bill as amended at Stage 2, 4 June 2014 | SP Bill39A (Session 4) 2014 |
| | |
| After Stage 2 | |
| | |
| (a) Delegated Powers and Law Reform Committee | |
| | |
| 21st meeting, 17 June 2014 | Col 1543 - 1544 |
| | |
| Stage 3 | |
| | |
| Consideration by the Parliament | |
| | |
| Stage 3 | Col 32513 - 32517 |
| | |
| Stage 3 debate – 19 June 2014 | Col 32518 - 32536 |
| | |
| Bill as passed – 20 June 2014 | SPBill39B (Session 4) 2014 |
| | |

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| <i>PROCEEDINGS AND REPORTS</i> | <i>REFERENCE</i> |
|---------------------------------------|---|
| ROYAL ASSENT | |
| 24 July 2014 | Buildings (Recovery of Expenses) (Scotland) Act 2014 (asp13) |