

POLICY NOTE

THE HISTORIC ENVIRONMENT SCOTLAND ACT 2014 (SAVING, TRANSITIONAL AND CONSEQUENTIAL PROVISIONS) ORDER 2015

SSI 2015/239

The above instrument was made in exercise of the powers conferred by section 27 of the Historic Environment Scotland Act 2014 (“the Act”) and section 38(4) of the Title Conditions (Scotland) Act 2003. This instrument is subject to negative procedure.

Policy Objectives

The purpose of this Order is make provision in respect of saving, transitional and consequential arrangements in respect of certain functions under the Ancient Monuments and Archaeological Areas Act 1979 (“the 1979 Act”) and the Planning (Listed Buildings and Conservation Areas)(Scotland) Act 1997 (“the Listed Buildings Act” and in respect of certain functions under the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, the Transport and Work (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007 and the Disclosure (Persons engaged in the Investigation of Crime or Sudden Deaths) (Scotland) Regulations 2011.

The functions for which provision is made are all functions which are currently discharged by Historic Scotland acting as Scottish Ministers, but which from 1 October 2015 will be discharged by Historic Environment Scotland (HES).

HES is a new NDPB established by the 2014 Act. It will act as the lead body for the historic environment.

The common principle informing all of the provisions within this order is that HES should take over functions as seamlessly as possible from Historic Scotland, provided only that the arrangements for the changeover do not cause inconvenience, cost or delay to property owners or applicants for consents where actions are already in progress.

The effective date for these Regulations is 1 October 2015, the date on which HES takes over its full responsibilities under the 2014 Act.

Part 2 - The 1979 Act

Article 2 of the Order deals with the Schedule of monuments compiled under Section 1. The Act confers the function of compiling and maintaining the Schedule on HES. Following transitional provisions at the time of devolution, the Schedule is currently treated as if compiled by the Scottish Ministers. This Order contains equivalent provisions at 2(1) to those made at devolution, so that the existing Schedule will be treated as if compiled by HES.

In order to avoid the suggestion that this should result in HES having to notify afresh every monument on the Schedule under Section 1(6), or that a decision has been made by HES which could be appealed under Section 1C, the transitional provision excludes the application of the deeming provision for the purposes of these sections.

In brief, HES will inherit the Schedule as it stands at 1 October 2015 and will not be required to act as if it had newly compiled the Schedule at that date.

Article 3 of the Order is a saving provision to allow certificates issued under Section 1(10)(b) before 1st October 2015 by the Scottish Ministers (or indeed by the Secretary of State before devolution) to be registered, and is necessary because the Act changes the provisions on the 1979 Act so that from 1 October 2015 only certificates issued by HES may be registered. This allows for the registration of pre 1 October 2015 scheduling decisions to be completed.

Article 4 of the Order allows that, where conditions on scheduled monument consent which were imposed by the Scottish Ministers before 1 October 2015 requiring pre-works site inspection, such inspections may be made by HES, acting as if HES had issued the consent in the first place.

Section 2(9), as amended by paragraph 5(e) of Schedule 2 to the Act will from 1 October provide that it is a defence where notice of the need of certain works is given to HES. Article 5 of the Order provides that the current law continues to apply for the purposes of allowing a defence where such notice was given to the Scottish Ministers before 1st October 2015

Applications for scheduled monument consent made under Section 2 and Part 1 of Schedule 1 to Ministers through Historic Scotland before 1st October will continue to be dealt with and determined by Ministers under the current legal framework. This is to ensure that there is no inconvenience, cost or delay to applicants. Article 6 of the Order therefore preserves Part 1 of Schedule 1 as it currently stands in relation to such applications.

Article 7 of the Order provides similarly that if a direction is given by Ministers under Section 4 to modify or revoke consent before 1st October the current law is to apply and so section 4 and Part 2 of Schedule 1 are saved in relation to such directions.

Section 55 provides for a challenge to the courts by way of statutory appeal. Article 8 of the Order preserves the current Section 55 for the purposes of allowing a challenge to a decision of the Scottish Ministers where the application for consent is made before 1st October or where the direction under section 4 is given before that date. (For cases arising after 1 October 2015, the Act provides a new route of appeal to the Scottish Ministers.)

There are changes to the provisions of the 1979 Act dealing with scheduled monument enforcement notices. The savings provisions set out in Article 9 of the Order retain the existing sections 9A to 9D and 9G, 9H and 9I for the purposes of an enforcement notice served before 1st October, so that any subsequent action are governed by the law as it applied at the date of issue of the notice.

Article 10 of the Order provides similarly in relation to temporary stop notices, with Sections 9K and 9N as it currently stands continuing to apply in relation to temporary stop notices served before 1st October.

Article 11 of the Order provides in respect of the inventories of gardens and battlefields, which are to be compiled and maintained by HES after 1st October. As with the Schedule or the List, the way the legislation is framed would indicate that as at 1st October the existing inventories are compiled as of new by HES with the potential for notification requirements to be engaged. The transitional provisions provide that the actions of Ministers in compiling the

inventories are treated as being done by HES for the purpose of the continuation of the inventories after 1st October. The Order also provides that the actions of Ministers in compiling or modifying the inventories before 1st October are not to be treated as those of HES for the purposes of section 32(4) – hence avoiding the suggestion that there may be a need to re-notify.

As it is possible that Ministers may have included an entry or modified the inventory before 1st October but have not yet notified the owner and other persons as required by section 32(4), that subsection is saved as it currently stands in respect of such inclusion or modification.

Article 12 of the Order provides in respect of consents issued under Section 42, which prohibits the use of metal detectors without consent. From 1st October the consent has to be the consent of HES. To avoid any suggestion that a pre-October consent given by the Scottish Ministers is no longer effective, consents granted by Ministers and remaining in effect are to be treated as if granted by HES. Any references in such consents to the Scottish Ministers or to Historic Scotland (for example in relation to any condition or approval under the consent) are to be treated as being to HES, so that HES may act in relation to discharging or giving effect to such conditions.

Part 3 - Listed Buildings Act

Article 13 of the Order sets out equivalent provisions for the continuation of the List and disapplication of sections 1A(2) and 5B as are made for the Schedule and inventories compiled under the 1979 Act in Article 2. In effect, HES inherits the List as it stands at 1 October 2015 without requiring to re-notify or being deemed to have made an appealable decision.

Article 14 deals with building preservation notices which involve a request to consider listing the building. If this request has not been determined by 1st October it is treated as having been made to HES (as HES will make decisions on listing from that date). If a decision not to list is notified by Ministers before 1st October then Schedule 2 should continue to apply as it currently stands. If notification of a decision not to list is given to the planning authority before 1st October then the Scottish Ministers will still have to give notice to the owner and other persons under section 3(6)(a) (although this has been given “immediately” so this should be a very limited possibility). The date on which the 12 month period begins, within which a local authority may not serve another building preservation notice in respect of the same building, is the date of notification by Ministers rather than by HES.

As HES will control listing after 1st October, Article 15 of the Order is intended to secure the most efficient approach to applications under section 5A for certificates that it is not intended to list a building (“certificates of immunity”) which are still outstanding at 1 October. This is to treat such applications as having been made to HES. Also if Ministers have issued a certificate, then the prohibition on listing should apply in the same way as if HES had issued the certificate.

Section 7(2)(b) provides that demolition works are authorised if notice has been given to the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS) under section 7(2)(b) and either 3 months access is made available or a statement is given that recording is complete or not desired. Article 16 of the Order takes account of the fact that

from 1 October 2015 the functions of RCAHMS will be undertaken by HES instead. If notice is given before 1st October but no statement has been made by that date then the transitional provisions provide that the authorisation of the works under section 7(2) applies as if the notice was given to HES and the any period in which RCAHMS was allowed access before 1st October is taken into account when calculating the 3 month period.

Article 17 of the Order preserves the existing listing notification and direction provisions in relation to an application for listed building consent made before 1st October.

Article 18 of the Order preserves the existing provisions for orders under Section 21 revoking or modifying listed building consent in relation to an order made before 1st October.

Article 19 provides similarly in respect of the designation of Conservation Areas to the provisions made in Articles 2 (scheduling) and 13 (listing), so that Conservation Areas designated by the Scottish Ministers prior to 1 October 2015 do not require to be re-notified by HES.

Part 4 – Other enactments

Article 20 amends the Ancient Monuments (Class Consents) (Scotland) Order 1996 to change that Order's provisions to refer to HES instead of, or as well as, the Scottish Ministers in relation to:

- works which are taking place for urgent reasons of health and safety (Class V) - HES only;
- works of archaeological evaluation arising in connection with scheduled monument consent (Class VI) – both HES and Scottish Ministers (since both have power to give such consent);
- works executed under agreements under section 17 of the 1979 Act (Class VII) – neither HES or the Scottish Ministers is named, though HES is likely to be the only party concluding such agreements in future;
- certain works undertaken by (RCAHMS) (Class IX) – HES only, as HES is taking over the functions formerly performed by RCAHMS.

Article 21 amends the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003 so that HES is added to the list of bodies which may create Conservation Burdens. This allows HES to make charges on property titles. This makes it easier to recover any moneys due as a result of grant or loans where conditions of the grant or loan have not been fulfilled at the point when a property is sold, and supplements existing powers for recovery which require the outgoing owner to be pursued.

Article 22 amends the Transport and Work (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007 to assimilate procedures where a project requires both an application under section 2 of the Transport and Works (Scotland) Act 2007 and scheduled monument consent, by inserting HES as a body to be consulted in place of the Scottish Ministers under the 2007 Rules in cases affecting scheduled monuments. The current arrangements are saved for applications and proposals made before 1 October 2015.

Article 23 amends the Disclosure (Persons engaged in the Investigation of Crime or Sudden Deaths) (Scotland) Regulations 2011 to remove Historic Scotland and to add HES to the list of bodies which may report crimes direct to Procurators Fiscal in relation to their areas of

expertise. HES will maintain training for staff who may be expected to exercise this function.

Consultation

The policy approach adopted in this Order was informed by discussions with key stakeholders and by comments received during a formal public consultation between 19 December 2014 and 27 March 2015. There was a majority of comment in support of the principle that HES should take over functions as seamlessly as possible from Historic Scotland, provided always that the arrangements for the changeover do not cause inconvenience, cost or delay to property owners or applicants for consents where actions are already in progress. The need to avoid double handling between old and new arrangements was seen as desirable, particularly by local authorities, who handle listed building and conservation area consent applications.

Impact Assessments

An Equalities Impact Assessment (EQIA) has been carried out for the regulations which set out the detailed changes in process, and this also addressed the general principles of transitional arrangements set out in this Order. It is not considered that the provisions of this Order will have any impact as distinct from the matters already considered as part of the original EQIA carried out prior to introduction of the Bill for the 2014 Act.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed for the regulations which set out the detailed changes in process and this also addressed the general principles of transitional arrangements set out in this Order. It is the specific intention of this Order that it will avoid any negative impacts which might otherwise arise for actions “in hand” at 1 October 2015, by continuing existing handling arrangements rather than forcing applications and other actions to recommence under the new procedures. This is reported in the BRIA which will be published to coincide with the laying of this Order before Parliament. Overall, that BRIA concludes that the new arrangements will have a slight positive impact, but points out the risks for cases in hand, which the provisions of this Order address.

Culture and Historic Environment Division
Scottish Government

2 June 2015