

Keeping Scotland Safe – The Building Repairs (Scotland) Bill Consultation

Consultation Reply

Response by



East Lothian Council

Building Standards

Contact:

John Murdoch

Building Standards Manager

Environment

John Muir House

Haddington

EH35 5HX

Housing Strategy & Environmental Health

Alan Wood

Senior Grants Officer

Housing Strategy

Community Housing & Property Management

Penston House

Macmerry Ind. Estate

Macmerry

EH33 1EX

Environmental Health & Trading Standards

Contact:

Finlay Mackay

Environmental Protection Manager

Tranent AO Sanderson's Wynd

Tranent

EH33 1DA

1. What do you believe are the current problems with the enforcement of dangerous and defective buildings legislation?

1.1 Building Standards Comments

Major issues are:

1.1.1 Financial Resources

- 1.1.1.1 Owners, buy-to-let landlords, absentee owners, absentee landlords and maintenance and repair leases all can have problems due to lack of money, the recession, inability to raise loans and reduced property values resulting in no equity in the property to raise finance for emergency work or routine repairs.
- 1.1.1.2 Reduction in Government Grants to Local Authorities impacts on the resources available to carry out works and to fund the substantial staff time involved to administer the legislation and deliver the works required for dangerous and defective buildings.

1.1.2 Ability To Retrieve Costs

- 1.1.2.1 Legislation requires that a Local Authority must take action to make safe a dangerous building if the owner fails to react to a Notice, therefore they must incur costs.
- 1.1.2.2 Charging Orders have been dropped from the Building (Scot) Act 2003 and therefore costs can only be recovered by civil means, which can be expensive and can often deliver poor financial returns.
- 1.1.2.3 Debts are therefore often written off which means problems with privately owned property are being resolved by public money which cannot be correct and in the long term cannot be sustained.
- 1.1.2.4 Charging orders allow the retrieval of costs when the property is sold. This can result in the Local authority waiting years for its money. Although interest is paid on the debt the monies should be recovered by a quicker mechanism.
- 1.1.2.5 The Building (Scot) Act 2003 gives Local Authorities the discretionary power to act on a defective building. Due to the lack of money and the inability to ensure costs are retrieved most Local Authorities are not using this power.
With the lack of a legal definition of what a “defective building” is and the reducing Local Authority staff and financial resources even the reduction of charging orders may not see increased activity by Building Standards to resolve defective buildings.

1.1.3 Ownership, Responsibilities And Share Of Costs

- 1.1.3.1 Notices must be served on the owner which can be a lengthy and expensive exercise e.g. absentee owner, owners hiding behind the Data Protection Act, owner companies who go into liquidation half way through the enforcement action, then start up again as another company in the same premises, so derailing the process of the enforcement notice.
- 1.1.3.2 Owners are often unaware or do not understand their responsibilities for communal areas of their building and often responsible owners who wish to resolve problems cannot do so because of absent or irresponsible owners frustrating attempts to carry out works
- 1.1.3.3 Costs are split as per the conditions of the deeds which can place greater burdens on sections of the building causing difficulties in securing an agreement between owners.
Can the apportionment of the costs be as per the numbers of owners involved as per Edinburgh’s unique legislation

1.1.4 Raft of Legislation covering the Same topic

There are varying pieces of legislation available to a Local Authority to deal with dangerous and defective buildings namely:

Section 179	Proper Maintenance of Land Notice – Town and Country Planning (Scotland) Act 1997
Section 28	Defective Buildings Notice – Building (Scotland) Act 2003
Section 30	Dangerous Building Notice – Building (Scotland) Act 2003
Section 30	Works Notice – Housing (Scotland) Act 2006
Section 43	Maintenance Plans – Housing (Scotland) Act 2006
Sections 20-22	Power to advance well being - The Local Government in Scotland Act 2003

Also there is new piece of legislation, currently being considered for use by Planners, to secure the repair and maintenance of listed buildings. This Historic Environment (Amendment) (Scotland) Bill is introduced will include the ability to recover costs from owners through legislative means.

1.2 Housing Strategy & Environmental Health Comments

The financial implications of enforcing dangerous and defective building notices without being able to secure recovery of the debt make the legislation an unattractive option for Local Authorities. The fact that ‘housing’ legislation (under the Housing (Scotland) Act 2006) allows for the recovery of costs associated with enforcement of Work Notices means that there is inequality between different pieces of legislation which ultimately have the same aim. That Work Notices to deal with disrepair in buildings which contain housing, have greater powers in relation to recovery of costs than Dangerous Building Notices, would seem to raise questions about what legislation is the most appropriate for local authorities to use.

2. In your opinion, what changes should be made to current legislation to allow for a more effective system of identification and enforcement?

2.1 Building Standards Comments

- 2.1.1 Introduction of charging orders to the Building (Scotland) Act 2003, preferably with some mechanism that would deliver an earlier retrieval of the public funds used to secure the repair of the building to a safe condition would greatly improve the current situation for dangerous buildings. This should be done as a matter of urgency and thereafter consider the unification of powers into a single pieces of legislation.
- 2.1.2 Simplification of the legislation to preferably one piece of legislation that covers all building types.
- 2.1.3 Introduction of legislation that allows Local Authorities to obtain full ownership details of all properties that will secure the recovery of costs.
- 2.1.4 Legislation should deliver a clearer definition of “defective building” so that it does not require action on “trivial” maintenance and repair issues.

2.2 Housing Strategy & Environmental Health Comments

- 2.2.1 The legislation should be aligned with the Housing (Scotland) Act 2006, enabling local authorities to recover costs of enforcing notices relating to dangerous and defective buildings in the same way as they can currently for properties below tolerable standard, serious disrepair or disrepair and likely to deteriorate.
- 2.2.2 The Housing (Scotland) Act 2006 replaced Charging Orders with Repayment Charges when recovering costs relating to a Work Notice. This should also be used as the means of recovering costs relating to Dangerous or Defective Building Notices. To have two different systems operating concurrently would be difficult for local authorities to administer.

3. What do you see as the benefits of charging orders in enabling local authorities to recover costs from owners of dangerous and defective buildings?

3.1 Building Standards Comments

- 3.1.1 Prior to the Building (Scotland) Act 2003 Local Authorities took emergency action to remove immediate danger from buildings safe in the knowledge that the resultant debt would be secured by placing a Charging Order against the property.
- 3.1.2 Currently there is no such option and accordingly a great deal of staff time and resource is used to monitor buildings suspected of being dangerous and negotiating with owners to secure action to ensure the building does not become immediately dangerous. This can be a protracted process and, depending on the frequency of inspection, there is a risk that there could be a dangerous occurrence between monitoring inspections.
- 3.1.3 Certainty that public money will be retrieved, so not being used to subsidise the repair and maintenance of privately owned buildings, and a reduction on the risk from monitoring buildings suspected of being dangerous.
- 3.1.4 Charging Orders are place on the property but their disadvantage is that Local Authorities would still have to wait for repayment when the property is sold, which could be years down the line.
- 3.1.5 Defective building powers have not been used by Local Authorities for the reasons stated in the above answers. The introduction of Charging Orders and better definition of the tern “defective building” may increase their use but that is not guaranteed.

3.2 Housing Strategy & Environmental Health Comments

- 3.2.1 Repayment Charges should be used rather than Charging Orders to align the enforcement of dangerous and defective buildings with other legislation currently being used by Council's.
- 3.2.2 There are a number of benefits to local authorities being given the power to recover costs of dangerous and defective buildings using a Repayment Charge. The main benefit is clearly reduction in unsecured debt and reduced financial liability to the local authority taking action against dangerous or defective buildings. This is a significant barrier to the use of dangerous building legislation. The proposals to the debt to be secured against the property will enable local authorities to make better use of existing legislation and to make decisions based on case merit rather than cost.
- 3.2.3 The proposals to introduce Repayment Charges to recover costs against dangerous and defective buildings would remove the inequality which currently exists between notices served under the Building (Scotland) Act 2003 and the Housing (Scotland) Act 2006.
- 3.2.4 In addition, by enabling local authorities to secure debt recovery, owners who have been neglectful in dealing with repairs and maintenance are not inadvertently benefited. One of the aims of the Housing (Scotland) Act 2006 is to encourage owners to take greater responsibility for the repair and maintenance of their properties. As the issue of disrepair and dangerous condition are clearly so closely related, it would seem counterproductive to maintain a situation where owners of the most poorly maintained buildings in Scotland can be absolved of their responsibility to pay for works.

4. What do you see as the disadvantages of charging orders?

4.1 Building Standards Comments

- 4.1.1 Local Authorities would still have to wait for repayment when the property is sold, which could be years down the line.
- 4.1.2 Properties of low value and in poor condition, especially listed buildings, often require continuous monitoring and recurring work. Resultant costs may be more than the property is worth and so not cover the Charging Order costs, which in turn would impact on the sale price and the recovery of Local Authorities outlay.
- 4.1.3 A balance has to be struck between the minimum amount of work need to secure public safety, the costs involved, legislative considerations e.g. listed buildings and the interests of the owners. Often full scale demolition would be the cheaper option but often retention and shoring is required inducing further expenditure.

4.2 Housing Strategy & Environmental Health Comments

- 4.2.1 The only disadvantage in the proposals is the use of Charging Orders rather than Repayment Charges. To have two different systems operating concurrently would be difficult for local authorities to administer.

5. What do you see as the benefits of charging orders to owners of dangerous and defective buildings?

5.1 Building Standards Comments

- 5.1.1 Responsible owners in multi-ownership buildings that become dangerous will have the comfort that the Local Authority will not have long protracted discussions on the immediacy of the danger but will take action to render the building safe irrespective if other owners are reluctant to act and that any resultant debt will be fairly apportioned.
- 5.1.2 Those who pay up front will know that the owners who are unable or unwilling to pay will not escape payment as the Charging Order will kick in at the time of sale. Everyone is treated fairly as all will have to pay.
- 5.1.3 Owners who are unable or unwilling to pay could view the Charging Order process as a method of spreading payment of repairs over the time they take to sell their property.

5.2 Housing Strategy & Environmental Health Comments

- 5.2.1 Owners of dangerous and defective buildings who wish to participate in repairs work are likely to benefit from the introduction of Repayment Charges as the current system can reward inaction. If owners know that if they fail to carry out work then the local authority can secure the debt as a first charge on the property (and levy an administration charge), they may be more likely to engage from the outset.

6. What do you see as the disadvantages of charging orders to owners of dangerous and defective buildings?

6.1 Building Standards Comments

- 6.1.1 Charging Orders remain on the property until it is sold and could impact on the value of the property and be a deterrent to future purchasers but it acknowledges that the owner has not met his/her responsibility for the maintenance of the property.
- 6.1.2 Irresponsible owners are made to meet their responsibilities by being forced to ultimately pay for the necessary work through the Charging Order process. This could be construed as a disadvantage to them but it is a definite advantage to the responsible owners in a shared building.

6.2 Housing Strategy & Environmental Health Comments

- 6.2.1 The main disadvantage of using Repayment Charges laid out in the 2006 Act is that these cannot be used to secure debt against a commercial building. As highlighted in the consultation document, the recovery of costs from businesses through debt recovery routes can be particularly difficult. This has previously been highlighted as an issue in relation to the enforcement of Work Notices and this opportunity should be used to amend existing legislation to enable Repayment Charges to be used where commercial premises are involved in housing repairs.

7. What would be the benefits or disadvantages of changing the notice period in relation to defective building notices?

7.1 Building Standards Comments

- 7.1.1 Section 28 of the Building (Scotland) Act 2003 provides flexibility to Local Authorities to change dates to accommodate the programming of work required to comply with the terms of the notice.
- 7.1.2 Too much flexibility or extended timescales could engender complacency within the ranks of the owners and result in further deterioration of the building

7.2 Housing Strategy & Environmental Health Comments

- 7.2.1 Local authorities should have the ability to decide on the urgency of work and set timescales accordingly. If the danger has been secured then allowing owners time to organise the work is reasonable. It would seem that the existing notice period of 7 days to commence work in relation to a Defective Building Notice is impracticable if the aim is to encourage owners to do the required work themselves rather than rely on the local authority to enforce the notice, particularly where groups of owners are involved.
- 7.2.2 However, it must be ensured that any changes do not result in indefinite delays in work being completed where it is unlikely the owners will ever be able to reach agreement. A Work Notice served under the Housing (Scotland) Act 2006 allows local authorities to set both a time period for commencement and completion and enables the local authority to enforce the notice if the work is not progressing. This would seem to strike the right balance between allowing owners time to organise the work while ensuring repairs are progressed.

8. Do you think this would allow adequate time for owners to carry out repairs to their properties and please give a reason for your response?

8.1 Building Standards Comments

- 8.1.1 7.1.1 above confirms that dates are flexible and would allow determination of timescale that are proportionate to the condition of the defective building and the conditions the occupiers are experiencing e.g. would it be reasonable to expect the occupants of a top floor flat to live with a roof leak for 12 weeks while occupiers of lower flats have no obvious impact on their living conditions. 12 weeks would not only be distressing to those immediately affected but could also cause increased damage to the fabric of the building.
- 8.1.2 A short Notice period highlights whether the owners are likely to react and if not would allow work to be undertaken by default.

8.2 Housing Strategy & Environmental Health Comments

- 8.2.1 East Lothian Council have set timescales for complying with a Work Notice, the notice can be varied to suit individual circumstances however in most cases owners have 2 months to commence work, and the work must be completed within 9 months. Having both a commencement and completion date is considered important to ensure the progress of work continues.

9. What do you see as the advantages or disadvantages of the proposal?

9.1 Building Standards Comments

- 9.1.1 **Advantages:**
- Comfort that to Local authorities that expenditure will be recovered.
 - Longer timescale could be perceived to be more realistic with shared building situations but this can be accommodated by the flexibility of existing legislation – see 7.1.1 above
- 9.1.2 **Disadvantages:**
- Expenditure on refurbishment works or full scale demolition may exceed the value of the property which would impact on the amount of money that would be recovered by the Charging Order process.

9.2 Housing Strategy & Environmental Health Comments

- 9.2.1 See answer to Q7.

10. What do you see as the advantages and disadvantages of an automatic equal shares provision for local authorities in cost recovery for work carried out by them on dangerous and defective buildings?

10.1 Building Standards Comments

10.1.1 Advantages:

- Simpler and therefore quicker legal and financial procedures and agreements
- No costly and time consuming interrogation of title deed conditions and negotiation on shares
- Often in mixed-use developments commercial units have a higher proportion of apportioned costs due to rateable values, which is not proportionate to their share of the work to be carried out.

10.1.2 Disadvantages:

- May seem unfair to owners in mixed-use developments if they pay more than their legal entitlement under the title deeds i.e. smaller properties
- Owners with large share, as defined by the, title deeds, may default from repairs so that the Local Authority steps in to carry out the work and the be charged a lower equal share.

10.2 Housing Strategy & Environmental Health Comments

10.2.1 The main disadvantage to the proposal is that costs are automatically shared equally is that it introduces a system whereby different forms of statutory action are administered differently. This may be difficult for local authorities to administer and may be confusing for the public. Also, if owners are to be given an opportunity to comply with the notice first they must surely abide by any conditions set in the title deeds. It is possible that if one owner has a greater share, they may block work from progressing in the knowledge that if the local authority enforces the notice and recovers expenses they will actually reduce their share of the costs.

10.2.2 Where title deeds exist these should be used as the basis for sharing costs. Where title deeds are silent or unclear then the Tenements (Scotland) Act 2004 should be used. It should be noted that while it is correct that the Edinburgh Confirmation Act is unique in relating to the 'equal share basis' for recovering costs this Act was brought in some time before the Tenements (Scotland) Act 2004 which has sought to address many of the issues relating to organising and paying for common repairs. In theory it should now be unnecessary to set an arbitrary system to fairly allocate costs

11. What do you see as the advantages and disadvantages of a certification and inspection regime for buildings?

11.1 Building Standards Comments

11.1.1 What department in Local Authorities would administer such a certification and inspection scheme? It appears that the proposal is mirroring similar powers contained in the Housing (Scotland) Act 2006

11.1.2 Advantages:

- Reinforce owners' responsibility to maintain their property inclusive of the communal areas associated with their property.
- Give an early warning of areas of the building requiring attention
- Reduce the instances of dangerous buildings so reducing the risk to public safety
- Reduce the instances of defective buildings requiring Local Authority intervention
- Give confidence to future purchasers.

11.1.2 Disadvantages:

- Increased costs to owners but this could be offset by not having major costs from unexpected building failures
- Conflicts with the powers contained in the Housing (Scotland) Act 2006
- Fines for non-production of certification?

11.2 Housing Strategy & Environmental Health Comments

11.2.1 As with the answers to previous questions the main concern regarding the proposals for a certification and inspection regime for buildings is that similar provisions already exist through the Housing (Scotland) Act 2006. The 2006 Act gave local authorities the power to issue a Maintenance Order, requiring owners to submit a 5 year Maintenance Plan. In cases where the Maintenance Plan is not drawn up or implemented the local authority can take enforcement action. The proposals outlined here appear to have a similar aim to the existing legislative powers and it is unclear the extent to which they would provide an additional benefit.

11. What do you see as the advantages and disadvantages of a certification and inspection regime for buildings? (continued)

11.2 Housing Strategy & Environmental Health Comments

- 11.2.2 Although there has been very limited use of Maintenance Orders to date, informal feedback from other authorities indicates that there is an appetite for their use. Local authorities have been required to implement a raft of legislation relating to the repair and maintenance of private sector housing over the past two years and more time is required to assess the full impact of this power. From 1 April 2010 all local authorities have been required to have a Scheme of Assistance in place. One of the aims of the Scheme of Assistance is for local authorities to take a more proactive approach to improving the condition of private sector housing however again more time is required to assess the impact of this duty. Additionally it must be recognised that in a time of reducing budgets, local authorities face significant restraints when taking proactive action against disrepair

12. Do you have any comments on the financial implications of the proposals?

12.1 Building Standards Comments

- 12.1.1 Charging Orders for **dangerous buildings** has to be an improvement to enable recovery of cost for emergency work that Local Authorities **must** carry out to meet the requirements of the legislation.
- 12.1.2 Improvements should be made to the Charging Order process to ensure owners are easily identified and payments earlier than at the resale of the property.
- 12.1.2 Until the Building (Scotland) Act 2003 is amended to put defective buildings on the same status as dangerous building, i.e. that they must be resolved until this is resolved it is unlikely that cash strapped Local Authority Building Standards sections will use the legislation even if charging Orders are introduced. The term defective building must be clearly defined.

12.2 Housing Strategy & Environmental Health Comments

- 12.2.1 The proposals to enable local authorities to secure the recovery of the cost of enforcing a Dangerous or Defective Buildings Notice are likely to have a positive financial impact. Given the financial constraints being experienced across Scotland it is difficult to continue to justify public expenditure which is the responsibility of individual owners and can be extremely difficult to recover. While it is correct that local authorities have a responsibility to ensure that dangerous buildings do not pose a risk, this responsibility should not extend to bearing the cost of the work.

13. Do you have any comments on enforcement of the proposals?

13.1 Building Standards Comments

- 13.1.1 Charging Orders will give more confidence for carrying out the work associated with enforcement action as costs will be recovered.
- 11.1.2 As stated in 1.1.1.2 above, if there are no further Government monies to resource an enhanced enforcement procedure, Local authorities will be unable to deliver the outcomes expected
- 11.1.2 A single all encompassing piece of legislation would greatly simplify the enforcement work of Local Authorities.

13.2 Housing Strategy & Environmental Health Comments

- 13.2.1 Local authorities are already familiar with the use of Repayment Charges in relation to Work Notices therefore existing policies and procedures should be in place.

14. Are there any equality issues that arise from these proposals?

14.1 Building Standards Comments

- 14.1.1 As the proposals are directed at buildings and not individuals, equality issues should not arise.

14.2 Housing Strategy & Environmental Health Comments

- 14.2.1 No comment