

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

Consultation Reply

Response by  
Planning and Economic Development Department  
Scottish Borders Council

February 2011

Scottish Borders Council welcomes the opportunity to respond to the private member's consultation paper on The Building Repairs (Scotland) Bill and would respond as follows.

## **Question 1**

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

Problems associated with enforcement action under either dangerous buildings or defective buildings legislation emerge early in the process. In order that a Notice can be legally served, it is necessary to first establish the owners of the property.

Scottish Borders Council, (SBC) currently utilises a range of methods including writing to people at the address of the defective property; legal searches through Registers Direct and through undertaking detailed searches through search companies. Nevertheless, sometimes property owners cannot be traced and even where we are able to secure a lead on the location of an owner, we regularly encounter barriers under the Data Protection Act. Whilst the Act allows for exemption for appropriate data disclosures, lenders who hold standard security over property and who may be able to provide confirmation of ownership cite the Act to withhold information, (see Fig 1 Redacted letter). This requires an authority to raise a time consuming and potentially costly civil legal proceeding to compel disclosure. The state of the building in question may be expected to continue to deteriorate over this period. Such resource-intensive activities act as a major deterrent to authorities in their efforts to tackle dangerous and defective properties.

Whilst the Local Government (Scotland) Act 1973 provides for the service of a Notice on an "Owner", this only enables works to be undertaken and does not assist in the recovery of the public funds at the end of the process.

In addition to the obstacles which exist in establishing ownership, the costs involved in undertaking extensive tracing can be prohibitively expensive. Typically, it costs up to £500 to engage a firm of professional searchers to track down a title dead.

Having determined that direct action works are required and having undertaken the required works, the recovery of the monies expended by a Council can also prove problematic, with some owners engaging in lengthy exchanges of correspondence to delay the need to pay works invoices.

It should be noted that whilst the focus of this consultation is on dangerous and defective buildings other sections of the Building (Scotland) Act 2003 for example Section 27 (Unauthorised works) would benefit from the principles outlined in this response.

## **Question 2**

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

There are several tools available to a local authority to deal with 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

All of the above are of assistance to Local Authorities in bringing property up to an acceptable standard. However, an opportunity now exists to introduce legislation that combines the best of the current legislation into one statutory instrument, dealing solely with defective and dangerous buildings.

A new Statutory Instrument should address the following:

- How to deal with preventative measures, (such as vegetation growth from wallheads and gutters);
- Who a Notice should be served on, (owner, tenant mortgage company);
- What happens when an owner cannot be traced, (i.e. service of Notice on the “owner of” at the address of the property);
- The methods of Notice delivery and what happens when a Notice is returned, (recipients regularly refuse to sign for a recorded delivery letter. This only becomes apparent when the Post Office returns the letter. Legal advice suggests that if it is returned then it has not been correctly served. This causes many problems and delays the whole process normally resulting in the need to re-serve all Notices);
- Powers for local authorities, when pursuing action under statute, to secure data which would normally be concealed under provisions of the Data Protection Act.

### Question 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?***

As a charging order is placed on a property rather than on an individual it allows greater security to local authorities by enabling a claim against the property. This would allow, in circumstances where the owner cannot be traced, a more timely resolution to the defects and provide for an additional method of debt recovery, with reduced cost outlay for their production and registration.

In order to be effective, there does however need to be a mechanism to require the charging order to be “called-up” at the point of sale of the property. This may happen at present in some circumstances in relation to extant 1959 Act Charging Orders whereby, following examination of title etc by a purchaser’s solicitors, the sum is settled. However, there have been instances under the previous 1959 Act regime where a commercial decision has been taken not to repay the Charging Order. Where money is changing hands, we consider that there ought to be a mechanism to require public funds to be repaid to protect the public purse.

In addition, it should be clear that any such charging order should be treated as “first ranking” in relation to any standard securities. Any lending decision is taken in a commercial context and in our view, this would promote greater interest from lenders as to whether obligations to maintain property are being met.

#### **Question 4**

##### ***What do you see as the disadvantages of charging orders?***

The ability to use another method to secure the recovery of public monies does not create difficulties other than being dependant on a transfer of property ownership which can take some time.

#### **Question 5**

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

Benefits include allowing an owner three methods of payment:

- Level a) The charge plus an annual interest payment – which can be paid at any time;
- Level b) The annuity which is set at the time the Order is applied. The annuity can be seen as a form of endowment policy whereby if the annual annuity sum is paid for the period set, the debt is paid off;
- Level c) The debt is settled at the time a property transacts.

In order for the Charging Order regime to be effective, it is suggested that it would be beneficial to make it clear that the sum can be “called-up” in the event of failure to make payment of annual charges. This could result in sale of the property if necessary – akin to a standard security. It is suggested that such a power be discretionary and is clearly not something an authority would seek to exercise without due cause. It would also require to be made clear that where this was not exercised in a particular year, that the opportunity to do so was not lost for future years.

#### **Question 6**

##### ***What do you see as the disadvantage of charging orders to owners of dangerous and defective buildings?***

There is no disadvantage from the Local Authority’s perspective in our efforts to protect public funds, whilst ensuring public safety.

#### **Question 7**

##### ***What would the benefits or disadvantage of changing the notice period in relation to defective buildings notices?***

The current Notice is comprised of two elements:- a minimum period of 21 days to appeal, which can be extended by the local authority; and a period in which works should start and be completed. The legislation also allows for the LA’s to amend the period in which works should start and be completed.

As the legislation allows for amendments to either or both of the two time periods, and given the length of time normally taken before a Notice is served, we do not

consider it necessary or desirable to amend the time periods. Indeed this Authority would strongly oppose any attempts to do so as local authorities are already required to act reasonably in implementing the existing arrangements. Where *bona fide* attempts are made by a proprietor to, for example, secure funding to undertake works, this would be taken fully into account. A formal Notice usually follows a period of informal discussions in any event. These proposals would, in our view, be unnecessarily cumbersome and protracted. The present arrangements facilitate this being left as a matter of discretion for the Authority, taking into account the particular facts and circumstances surrounding any case.

Delaying timescales etc in the manner suggested could ultimately result in further deterioration to property which could result in a structure becoming dangerous.

The guidance which should accompany the new statutory instrument could provide clarification to both owners and LA's on this matter.

### **Question 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?***

As advised under question 7 above, we do not consider it necessary to alter the current legislation in this regard. The experience of SBC is that common obstacles involve owners who either cannot agree on the need for works, or cannot agree to the costs, or to cost apportionment. Regrettably, a change in legislation will not address these issues.

In our experience, such discussions are often protracted through disputes between proprietors on "ownership", (in relation to boundary walls / tenements etc). Whilst at present the existing regime defines an owner as being the person capable of selling the property, the scope for such issues would, in our view, be reduced considerably with the introduction of a clear statutory presumption on "ownership." For example, in relation to boundary walls, it is suggested that the mid-point and in relation to tenements that the provisions of the Tenements (Scotland) Act 2004 ought to apply. Where there is genuine dispute about these matters, it should be clear that the appropriate mechanism involves a private civil case for the parties to pursue through seeking declarator of ownership.

### **Question 9**

***What do you see as the advantages or disadvantages of the proposals?***

It is considered that the proposals do not address other equally pressing issues surrounding defective and dangerous buildings as illustrated in the above replies to previous questions. An opportunity exists to introduce a simplified legal framework incorporating the best elements of other legislation and to provide clear guidance on implementation and to address the cost recovery process.

## Question 10

***What do you see as the advantages and disadvantages of an automatic equal share provision for Local Authorities in cost recovery for works carried out by them on dangerous and defective buildings?***

Scottish Borders Council works on the basis that the authority can apportion costs within reason and as it sees fit, on the basis that property owners retain the ability to take each other to court to address issues surrounding costs of communal repairs. The Council adopts a simple method to cost recovery and, in relation to communal repairs, (such as roofing), would apportion costs on an equal share basis. Thus, if a tenement consists of six flats, then each owner would be allocated one sixth share. Where works relate to chimney repairs, costs may be apportioned on a flue by flue basis.

It should be noted that local authority powers / duties are concerned with 'ownership' as opposed to responsibility for repair which exist at the civil level. SBC highlights this in all such dealings, and considers that property owners are first and foremost responsible for the proper maintenance of their own property.

## Question 11

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

At present the legislation covers all buildings, be they tenemental or detached and can be targeted towards specific problems as required.

Experience within SBC suggests that the primary use of Section 28 (Defective Buildings) legislation is within the tenemental sector. Given that the focus within this authority area has been on tenement properties, this Council would not support an inspection regime for detached or semi-detached houses. The introduction of an inspection and certification regime of tenement properties would allow owners to programme regular inspections and to identify problems early on which may enable preventative maintenance and future cost-avoidance for all parties.

It must be recognised that many tenemental properties are well maintained and do not cause problems to either the owners or the public at large. Thus, if an inspection and registration scheme were to be introduced, exemptions should be incorporated into the legislation to cover tenements which have, for example, a factoring scheme or an effective Residents Association in place from this context.

To enable such a scheme to be effective, it would require to be administered by an independent body such as a Local Authority, and to be enforced by the same body. However, building inspections could be undertaken by professionals in private practice with a local authority applying appropriate administration charges to fund the certification and enforcement regime. Any scheme must be based on a funding arrangement that ensures all the local authorities' costs are fully covered. It is considered that the proposed ten year cycle is too long to identify defects at an early stage. We suggest a five year cycle is used.

In order to avoid difficulties in the operation of such a scheme it would be useful to secure the support of the Law Society and other property professionals as their

members will be directly involved during the purchase of a property and possibly during the life cycle of the owner's tenure.

#### **Question 12**

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

The proposals to introduce charging orders are welcomed; failure to introduce a charging order regime would perpetuate the existing risks to the Councils which can act as a disincentive to Councils and create financial difficulties and risks which prevent works from being undertaken.

#### **Question 13**

***Do you have any comments on enforcement of the proposals?***

If the additional matters raised by this response are incorporated into the final statutory arrangements, then it is considered that Scotland would have a robust and fit for purpose legal framework to address the issue of defective and dangerous buildings. In addition to improving the workability of the current legislation, a targeted inspection regime would create a framework that would encourage owners to undertake regular preventative maintenance, thus preventing buildings from deteriorating in the first instance.

#### **Question 14**

***Are there any equality issues that arise from the proposals?***

As the proposals are directed at buildings and not individuals, we do not consider that any equality issues arise.

Fig 1. Redacted letter

Bradford & Bingley<sup>^</sup>

Our Reference: [REDACTED]  
Your Reference: [REDACTED]  
26 January 2011

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Scottish Borders Solicitors  
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Newton St Boswells  
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Scottish Borders  
TD6 0SA

CORPORATE RESOURCES

01 FEB 2011

ADMIN & LEGAL

Dear Sirs

Account Number: [REDACTED]  
Customer Name: [REDACTED]  
Property Address: [REDACTED]

Thank you for your letter dated 25 January 2011 and your comments have been noted.

The effect of Section 35 of the Data Protection Act 1988 is that we may release information and not that we must. I can advise that Bradford & Bingley policy is not to release information without our customers consent.

If you have any queries, please contact our Customer Care Centre on 0844 892 2590 between 8.30am and 6pm Monday to Friday or 9am to 1pm Saturday. Alternatively, you can write to us at the address shown below.

Yours faithfully

[REDACTED]

Customer Service Associate  
Securities

[REDACTED]

[REDACTED]

[REDACTED]

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