Local Authority Building Control

ADVICE NOTE ON LOCAL AUTHORITY
ENFORCEMENT POWERS

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ADVICE TO LABC CONSULT

Instructions

We have been instructed to provide legal opinion on the extent and use by Local Authority Building Control of the provisions set out in Sections 77 and 78 Building Act 1984 in relation to buildings which are considered to be dangerous and where intervention is being considered to respond to or alleviate risks caused by the danger.

We have been provided with a briefing note and a number of case studies.

Five specific questions have been asked in our instructions and we will respond to those using the same numbering.

1. **What situations could render a building in such a condition as to be dangerous?**

1.1 The Building Act 1984 ("the Act") provides options to a Local Authority ("LA") to take action if it considers the condition of a building or structure to be "dangerous". The definition of building/structure is broad and includes things such as garden walls, fences, hoarding or more generally, any built structure, whether temporary or permanent (Section 121 of the Act).

1.2 The Act does not specifically define "dangerous". In the absence of a statutory definition a Court would look at dictionary definitions to assist with interpretation. The Shorter Oxford Dictionary definition of "dangerous" is "fraught with danger or risk, perilous, hazardous, unsafe". "Danger" is defined as "liability or exposure to harm or injury, risk or peril". Dictionary.com defines danger as "a state of being vulnerable to injury, loss or evil; risk; a person or thing that may cause injury or pain". Our advice in light of these definitions is that the Act applies to buildings that are assessed as unsafe and which present an immediate or potential risk to health and safety.

1.3 If the building presents such a risk the LA can apply to a Magistrates Court for an order under Section 77 of the Act. The Court has power to make an order requiring the owner of the dangerous building to execute necessary works to remove the danger. Necessary works may include demolition. If the danger arises from overloading the Court can order restrictions on the use of the building.

1.4 A failure to comply with a Section 77 order is a criminal offence and gives the LA power to undertake the works and to recover the cost from the owner.

1.5 Section 77 is not an emergency remedy and inevitably it will take time to apply for and obtain an order from a Court, especially if the application is contested, with consequent cost and delay.

1.6 If the condition of the building presents an immediate danger the LA can take immediate action under Section 78 of the Act without obtaining a Court order. However, actions under Section 78 do not have the judicial backing that comes with a Section 77 order. As such, if the use of Section 78 proves to have been incorrect then there is the significant risk that the LA will be ordered to pay compensation.

1.7 Case law provides little discussion of the meaning of “dangerous” and it appears that danger should be assessed in light of the circumstances of the building in dispute. Some examples from reported cases are as follows:-
1.7.1 Premises that form part of a row of houses should be assessed in light of the fact that their collapse renders them a danger to the houses on either side: *London County Council v Jones & Another* (1912).

1.7.2 The roof of a Grade II listed building that had not been properly maintained and which was not likely to collapse imminently but the surveyor noted it may do in certain weather conditions. It was subsequently noted that the roof was becoming more susceptible to distress and movement as the weatherproofing sheets deteriorated. "Due to the fact that a truss is taking support off the stage arch projection and the deteriorating nature, the overall condition of the roof was unable to be classified as safe": *Swindon Borough Council v Forefront Estates Ltd* (2012).

1.7.3 A farmhouse was considered "unfit for human habitation" due to it being below standard. This included features such as low headroom, dished and sloping floors, uneven plaster, very poor natural lighting and very difficult staircase access to the upper floors. Although this was in relation to planning permission rather than action under section 77 or 78, it demonstrates features constituting a dangerous building /structure: *Forest of Dean District Council v Waite* (1987).

1.7.4 A Section 77 order has been made in relation to the lack of structural integrity of a pier: *Manolete Partners PLC v Hastings Borough Council*.

2. Is it appropriate to apply for an order to the Magistrates' Court under Section 77, where a safety feature of the building has been removed or does not exist? (I.e. an unguarded balcony, unsatisfactory means of escape, the removal of an alternative means of escape, on the basis that the "condition" of the building is considered to be dangerous).

2.1 Yes, if the building has been properly assessed by the LA and is considered as an actual or likely threat to health and safety the LA can apply to the Magistrates Court for such an order. This may include features of the building which have been removed, providing the basis of the LA's action is such that it considers the building to be classed as dangerous.

2.2 A significant advantage of using Section 77 is the judicial authority that the order will carry. A dissatisfied party against whom an order is made faces the prospects of appealing against the Court's decision rather than challenging the LA's administrative decision.

2.3 A failure to comply is a criminal offence and gives the LA automatic power to carry out the work and recover the cost.

3. Does dealing with a dangerous structure under Section 78 prevent an application to a Magistrates Court for an order under Section 77?

3.1 No. If a LA undertakes immediate action in accordance with Section 78 of the Act this action does not prevent the LA from applying for a Section 77 order after the immediate action has taken place.
3.2 It may be the case that multiple dangers in a building pose different levels of risk and require varying responses. A LA may undertake immediate work in accordance with section 78 of the Act providing it satisfies the criteria set out in the statute, i.e. that there is an immediate threat of danger to public health and safety. If other parts of the building also raise concerns, but these are only potential dangers, the LA can apply to the Magistrates Court under Section 77 for an order compelling the occupier/owner to complete work to alleviate the dangers.

3.3 It is important to note that in the recent decision in Manolete Partners PLC v Hastings Borough Council [2013] the High Court held that a LA cannot avoid liability to pay compensation under Section 106 of the Act (following immediate action in accordance with Section 78) by reason of an application under Section 77. Therefore, if an immediate response under Section 78 is followed by a subsequent application to the Magistrates Court under Section 77, a LA can still be found liable to pay compensation under Section 106 for any damage suffered as a result of the immediate works, up to the point that the Section 77 order is made.

3.4 It might be argued that taking action under Section 78 is undermined if there is a parallel Section 77 application on the basis that Section 77 suggests that the danger is not immediate. Please see our answer to question 4 below in relation to this point.

3.5 Any action taken under Section 78 must have the benefit of robust informed opinion that the action was necessary given the risks of judicial review and compensation. We advise that evidence should be secured and preserved in relation to the works carried out, including chronological photographic evidence.

4. Does fencing off of a dangerous structure remove the danger? Should further action and an order under Section 77 follow?

4.1 The steps necessary to alleviate the danger will depend on the circumstances of the case. LA building control officers are qualified to determine the actual danger. In addition, they can consult the Field Consultant Group if they wish to do so. LA’s have officers who are responsible for health and safety enforcement in those areas covered by the enforcement protocol with the HSE, plus access to expert opinion if required.

4.2 Fencing/cordoning off a particular section of a building to alleviate the danger is unlikely to be a long term solution to remove the danger and as such, the danger still exists. If the LA decides to fence off a particular area using Section 78 powers, the immediate danger may have been reduced but the ongoing risk is likely to remain, including the risk that the fencing is removed. In those circumstances an application for a Section 77 order would be both appropriate and consistent.

4.3 Fencing might be an insufficient response should there be a risk of collapse or trespass. This would raise issues similar to those under the Occupiers Liability Act 1984.

5. Is there any other appropriate legislation that could be used in place of Section 77 with the same powers that allow the LA to carry out work in default?

5.1 Improvement Notices under Section 215 of the Town and Country Planning Act 1990.
5.1.1 This provision provides a Local Planning Authority ("LPA") with the power, in certain circumstances, to take steps requiring land to be cleaned up when its condition adversely affects the amenity of the area. If it appears that the amenity of part of the area is being adversely affected by the condition of neighbouring land and buildings, the LPA can serve a notice on the owner requiring that the situation be remedied. These notices set out the steps that need to be taken and the time limit. Section 215 can be used in respect of land and buildings.

5.1.2 In the event that the Section 215 notice is not complied with the LPA has power to carry out the works and recover the costs. In this regard Section 215 carries a similar power to Section 77. However, it is not an urgent enforcement response and must carry time limits for compliance.

5.1.3 There is no requirement for "danger". Where costs cannot be immediately recovered the LPA has the option of registering a charge on the property with the Land Registry, thus assuring full cost recovery plus base-rate interest. There is also provision within the Land Charges Act 1972 for the interim procedure of placing an estimate of the charge that will become due on the property. This effectively ensures that the land or property cannot be sold without a charge being shown on the land.

5.1.4 Section 215 notices are subject to the right of appeal to a Magistrates’ Court.

5.2 Listed Buildings - Section 54 of the Planning (Listed Buildings and Conservations Areas) Act 1990.

5.2.1 These provisions allow a LA to execute any works which appear to them to be urgently necessary for the prevention of a listed building in their area.

5.2.2 The provisions are very similar to Section 77. The LA can apply to the Magistrates’ Court to obtain an order allowing it access for the purpose of carrying out works urgently for the preservation of a listed building.

5.2.3 The LA should notify the owner that it is considering serving an urgent works notice. The owner may then consider undertaking the work themselves. If the owner declines or is unresponsive the LA can execute the work, providing it is urgently necessary for the preservation. The owner must be given a minimum of 7 days written notice of the LA’s intention and the notice must describe the proposed works.

5.2.4 If the building is occupied the works may be carried out only to those parts not in use.

5.2.5 An urgent works notice should generally be restricted to urgent repairs to keep a building wind and weather-proof and safe from collapse, or action to prevent vandalism or theft. The cost of carrying out the works may be recovered by the LA from the owner. Such cost may include the continuing expense of providing temporary support or shelter of the building.

5.2.6 There is no requirement for there to be danger.
5.2.7 This process does take some time and so does not have the benefits of Section 78 but does have those of Section 77.

5.2.8 By definition the building has to be listed for this option to be available.


5.3.1 If it appears to a LA that any building in their area is unoccupied or the occupier is temporarily absent, and the building is not effectively secured against unauthorised entry or is likely to become a danger to public health, the LA may undertake works in connection with the building for the purpose of preventing unauthorised entry to it, or for the purpose of preventing it becoming a danger to public health. The LA can serve a notice on the owner, giving them 48 hours notice of the LA's intention to carry out works. The cost of works can be recovered from the property owner.

5.3.2 By definition this will not cover occupied premises.

5.3.3 This power is similar to Section 78 but not Section 77 as there is no Court order available.

5.4 Health and Safety Act Work etc Act 1974 ("HSWA") and associated regulations.

5.4.1 In the case of structural instability of buildings considered prejudicial to health and safety of the people in or around them, LA's are best placed to act since they have specific powers under the Building Act 1984.

5.4.2 However, if a problem is brought to the attention of HSE inspector or a potentially dangerous defect is noticed during normal inspection the HSE may become involved.

5.4.3 As mentioned above, LA's do have some health and safety enforcement responsibilities under the enforcement protocol with HSE.

5.4.4 Where a building or structure is subject to HSE enforcement and the premises are effectively inaccessible and its collapse or partial failure would not endanger the general public it may well be appropriate for any structural danger to be handled by HSE Inspectors who have powers under Section 20 HSWA. In many cases there will be a choice of the HSE enforcing under HSWA or the LA's enforcing under the Building Act 1984 or other legislation. The ultimate on-site sanction under HSWA may not be sufficient to remove all persons from danger.

5.4.5 There is no provision similar to Section 77 for a Court to make and order for works to be carried out with costs covered in default. HSE and LA Inspectors do have powers under Section 22 and 23 HSWA to serve Improvement and Prohibition Notices.
5.5 Hazard Awareness Notices - Housing Act 2004.

5.5.1 Under the Housing Act 2004 (“HA”) a LA has a duty to keep housing conditions in their area under review, with a view to identifying any action that may need to be taken by them (Section 3). If the LA have reason to suspect that a property in their area poses a risk and requires action under Section 3 and they consider that it would be appropriate for any residential premises to be inspected with a view to determining whether any category 1 or 2 hazard exists, the authority must arrange for an inspection to be carried out (Section 4(1) HA 2004).

5.5.2 This applies to dwelling houses and allows the LA to identify potential hazards, on a risk based scale, in order to determine what action is necessary. The Landlord (or owner’s) responsibility for the premises extends to the exterior and structural elements of the dwelling; and the installation within and associated with the supply and use of water, gas and electricity, personal hygiene, sanitation and drainage, food safety, ventilation, space and water heating. As such, this legislation covers a wide range of issues that could arise in a dwelling house and previous case law includes such hazards as excess cold: Liverpool County Council v Kassim [2012] and Simon v Denbighshire County Council [2009].

5.5.3 The statute gives rights of access but it does not provide powers similar to Section 77 and 78 Building Act 1984.

5.5.4 There is power for a LA to issue an Empty Dwelling Management Order in respect of empty domestic premises.

5.6 Properties located in London - London Building Act 1939 (Sections 61-62).

5.6.1 By definition this only applies in London.

5.6.2 This legislation provides that if the LA becomes aware that a building may be in a dangerous state they have a duty to instruct someone to complete a survey of the structure.

5.6.3 This can be completed by the district surveyor or by another competent surveyor (section 61).

5.6.4 If the building/structure is in such a state as to require treatment for the removal of any immediate danger the surveyor or superintending architect or any officer authorised by the LA as the case may be, must take the necessary steps to remove the immediate danger. Any steps taken which require expense shall be deemed to have been incurred by the LA (Section 62).

5.6.5 The surveyor shall certify to the LA his opinion of the state of the structure. If the structure is dangerous the LA may secure the structure and erect a proper hoard or fence for the protection of passers-by and shall cause notice in writing to be served on the owner or occupier, who will then be required to take down, repair or otherwise secure the premises (Section 62).
5.6.6 There is no apparent distinction between this power and Section 78 Building Act 1984, which also deals with immediate action to remove a danger. One difference may be that erecting fencing or hoarding is unlikely to be a sufficient measure under Section 78, whereas Section 62 specifically refers to the LA erecting fencing to protect passers-by.

5.6.7 There is no equivalent of Section 77.

5.7 Statutory nuisances – Section 80 Environmental Protection Act 1990.

5.7.1 Where a LA is not satisfied that the condition of a building is such that a statutory nuisance exists then a notice can be served requiring the abatement of the nuisance and execution of necessary works to achieve that abatement. A notice is subject to the right to appeal to a Magistrates Court and breach of the notice is a criminal offence.

5.8 Compulsory Purchase Orders (“CPO”).

5.8.1 Finally, in the event that owners or occupiers cannot be traced or are unwilling to make premises safe then a relevant LA has a number of statutory powers which may be used to apply for a CPO.

5.8.2 Those powers include:-

- Section 290 Housing Act 1985 – slum clearance.
- Section 17 Housing Act 1985 – bringing empty properties back into use.
- National Parks and Access to Countryside Act 1949 – applies to derelict, neglected or unsightly land.