

HISTORIC ENVIRONMENT (WALES) ACT 2023

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 — Buildings of special architectural or historic interest

Chapter 1 — Listing buildings of special interest

250. This Chapter requires the Welsh Ministers to maintain and publish a list of buildings in Wales. They must include in the list every building in Wales they consider to be of special architectural or historic interest (section 76). For the purposes of the transition from the 1990 Listed Buildings Act, the list of buildings maintained by the Welsh Ministers under section 1 of that Act will become the list maintained for the purposes of section 76 of this Act.
251. Inclusion of a building on the list — “listing” (section 76(6)(a)) — renders it subject to the consent regime, enforcement procedures and other provisions contained in Chapters 2 to 6 of Part 3 of the Act.
252. This Chapter sets out the requirements for consultation before the Welsh Ministers amend the list by adding or removing a building (sections 77 and 78). It also gives owners and occupiers the opportunity to request a review of the Welsh Ministers’ decision to list a building (sections 81 and 82). It establishes that, during the consultation period, a building being considered for listing enjoys interim protection as if it were already a listed building (section 79). If the Welsh Ministers decide not to list a building, a person with an interest in the building who suffers loss or damage as a direct result of interim protection may claim compensation from the Welsh Ministers (section 80).
253. The Chapter also provides for temporary listing by a planning authority (sections 83 to 85). Temporary listing allows an authority to confer the protection of listing on a building that it considers to be of special architectural or historic interest that is in danger of demolition or alteration that would affect its character. If temporary listing comes to an end under certain circumstances, a person with an interest in the building may be able to claim compensation from the planning authority for loss or damage suffered directly as a result of the temporary listing (section 86).
254. The Chapter concludes with provision for the Welsh Ministers to issue a certificate that they do not intend to list a building in Wales for a period of 5 years (section 87).

Section 76 — Duty to maintain and publish list of buildings

255. **Section 76(1)** places a duty on the Welsh Ministers to maintain a list of buildings in Wales and to publish the up-to-date list. The Welsh Ministers must include in the list every building in Wales which they consider to be of special architectural or historic interest. In practice, in determining whether a building is, in their opinion, of special architectural or historic interest, the Welsh Ministers will have regard to the non-statutory criteria for listing published in TAN 24.

256. [Section 76\(2\)](#) gives the Welsh Ministers powers to amend the list by adding a building (referred to as “listing” a building), removing a building (referred to as “de-listing” a building) or amending an existing entry for a building.
257. In practice, buildings are added to the list either as a result of systematic survey of particular areas or building types, or following “spot listing” requests relating to particular buildings from local authorities, amenity societies, other bodies, or individuals.
258. The Welsh Ministers will only de-list a building if new evidence becomes available relating to its special architectural or historic interest. Neither the condition of a building through neglect nor the cost of repairing or maintaining it are grounds for de-listing.
259. The powers to amend an existing list entry may be used to correct factual mistakes, including address or location errors, as well as to enhance or revise a listing in light of new evidence relating to a building’s special architectural or historic interest.
260. [Section 76\(3\)\(a\)](#) provides that the Welsh Ministers may consider a building in its wider context when weighing up whether it should be listed. If, for instance, a candidate building is part of a group — perhaps a well-preserved terrace of houses, an industrial or agricultural complex or a planned community — its contribution to the architectural or historic interest of that group may be taken into account in addition to its own merits.
261. [Section 76\(3\)\(b\)](#) allows for the desirability of preserving an artificial feature of a building on the grounds of its architectural or historic interest to be taken into consideration when determining if a building should be listed. These artificial features might include interior fittings, such as fireplaces, panelling or staircases, or exterior features, perhaps sculptures, clocks or commemorative plaques. Artificial features do not encompass movable furnishings.
262. The definition of “building” in section 210 (interpretation) encompasses any building or structure, or any part of a building or structure. The meaning of “building” for the purposes of listing has been considered in case law (such as *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] 1 WLR 2206). The definition in section 210 does not include (except in section 148) any plant or machinery forming part of a building or structure. This prevents large and complex pieces of plant and machinery, for example, steam engines, rolling mills or other industrial equipment, from being listed in their own right, either as freestanding constructions or independently of buildings that house them.
263. However, the presence of plant and machinery in a building may contribute to its special interest and be an important factor in a decision to list it. Once the building is listed, fixed plant and machinery contained within it will be included in the listing and will be subject to the controls in this Part.
264. [Section 76\(5\)\(a\)](#) clarifies that a “listed building” means a building which is included in the list and includes any structure or artificial object that is fixed to the building and ancillary to it; this will capture internal and external fixtures. On the other hand, movable furnishings, even of historic importance, are not part of the listing. For instance, subsection (5)(a) would apply to a fixed medieval masonry altar in a listed church, but not to a post-Reformation altar table. The requirement for an object or structure to be “ancillary” is based on case law, including *Debenhams plc v Westminster City Council* [1987] AC 396; *Morris v Wrexham County Borough Council* [2002] 2 P & CR 7; *R (Hampshire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2022] QB 103.
265. In this context, “artificial” is used as an idiomatic term for objects or features that have been made or crafted by humans, in contrast to natural objects or features. Its use in this context is of no relevance to any question of whether “artificial” materials (in the sense of being imitation or synthetic) may be used in the conservation or repair of listed buildings.

266. Subsection (5)(b) provides that the listing of a building extends to include separate ancillary structures or artificial objects if certain conditions are met.
267. The first condition is that the structure or object has to have formed part of the land since before 1 July 1948, the date on which the Town and Country [Planning Act 1947 \(c. 51\)](#), the first legislation that made provision for statutory listing of buildings of architectural or historic interest, came into force.
268. The second condition is that the structure or object must have been within the curtilage of the building, and ancillary to it, on the date that the building was first listed or 1 January 1969, whichever was later. The provisions of the [Town and Country Planning Act 1968 \(c. 72\)](#) that introduced the extension of listing to structures and objects within a building’s curtilage came into force on 1 January 1969. The date has been included to give greater clarity to the definition of a listed building in line with recommendation 13.10 of the Law Commission’s report, *Planning Law in Wales* (Law Com No 383, 2018).
269. The section does not define “curtilage”. Case law (*Attorney General (ex rel Sutcliffe) v Calderdale BC* (1982) 46 P & CR 399, CA as accepted by *Debenhams plc v Westminster City Council*, 1987) provides that it is the land closely associated with a building and its extent will be determined on a case-by-case basis. Factors to be considered in determining whether other structures or artificial objects are encompassed within a building’s curtilage may include:
- a. the physical “layout” of the building, associated structures and the land;
 - b. their ownership, past and present; and
 - c. their use and function, past and present.
270. Examples of curtilage structures and objects to which listing may be extended under subsection (5)(b) include outbuildings, boundary walls, and garden features and ornaments.

Section 77 — Notification of listing or de-listing of building

271. When the Welsh Ministers list or de-list a building, section 77(1) requires them to serve notice on every owner and occupier and every relevant local authority in whose area the building is located.
272. Subsection (6) defines a “relevant local authority” for the purposes of this section as:
- a. a county council or county borough council,
 - b. a National Park authority, or
 - c. a joint planning board.
273. A joint planning board may be constituted under section 2(1B) and (1C) of the [Town and Country Planning Act 1990 \(c.8\)](#) (“the 1990 Planning Act”) as the planning authority for two or more areas, each of which is the whole or part of a Welsh county or county borough. At the time of writing, there is none in Wales.
274. When a property is listed, the notice served by the Welsh Ministers must specify the date of its addition to the list and must include a copy of the list entry (subsection (2)).
275. Under subsection (3), a copy of a list entry served under this section is a local land charge. A [local land charge](#) will alert a purchaser to the restrictions imposed on the use of the land by the listing of the building.
276. Subsections (4) and (5) require relevant local authorities to keep available for public inspection copies of the list entries they are served with under this section and any list entries that remain up to date served under earlier Acts (subsection (4)(b)). In practice,

authorities normally provide routine access to all up-to-date list entries via Cof Cymru, for example, by means of free internet access in public libraries and similar venues.

Section 78 — Consultation before listing or de-listing building

Section 79 — Interim protection pending decision whether to list building

Schedule 7 — End of interim protection or temporary listing for buildings

277. **Section 78** puts in place a formal structure for consultation on the Welsh Ministers' proposals to list or de-list a building. It makes provision for inviting the persons identified in subsection (2) to make written representations on the proposed amendment to the list to the Welsh Ministers.
278. The service of a notice of a proposal to amend the list by adding a building will trigger interim protection under section 79. In that case, section 78(3)(b) requires the notice to explain the effect of interim protection and specify the date upon which interim protection takes effect.
279. Any building being considered for listing by the Welsh Ministers, unless already a scheduled monument (section 79(7)), will enjoy interim protection under section 79 from the beginning of the day specified in the notice served under section 78(1).
280. **Section 79(2)** provides that this Act (except certain specified sections) and the 1990 Planning Act apply to any building under interim protection as if it were a listed building. It will, therefore, be an offence to undertake works that alter its character without listed building consent and the full range of enforcement powers in Chapter 4 will be available to a planning authority or the Welsh Ministers in the event of unauthorised works. Section 118, however, does not apply to a building under interim protection. Interim protection will afford protection to a building during the consultation period, for example, from an owner who could otherwise have an incentive to deliberately damage or destroy the historic asset in an effort to undermine the protection that listing would otherwise have provided by making its listing pointless.
281. Subsection (4) requires the Welsh Ministers to publish a list of buildings subject to interim protection. At the time of writing these notes, the list appears on the "Statutory listed building consultation notices" page in the "Listed buildings" section of the Cadw website. Buildings under interim protection also appear as a distinct category of assets on Cof Cymru.
282. Interim protection ends when the Welsh Ministers decide whether or not to list a building and serve notice on every owner and occupier and the relevant local authorities under section 77(1) or section 79(5)(b).
283. **Schedule 7** provides for the effect of the end of interim protection under section 79(5)(b). It also makes provision about the effect of temporary listing coming to an end without the building being listed under section 85(4).
284. **Paragraph 2** of Schedule 7 establishes that, even after the end of interim protection or temporary listing, a person will remain liable to be prosecuted and punished for an offence under the Act committed while the building was protected.
285. On the termination of interim protection or temporary listing, paragraphs 3 to 6 make provision for:
- a. the cessation of the effect of listed building consents, temporary stop notices, and enforcement notices; and
 - b. the lapse of any proceedings associated with any of the above or an application for an injunction related to the building.

286. However, paragraph 5(3) allows for the continued application of section 132(1) to (6) to permit the recovery of costs reasonably incurred by a planning authority when taking steps specified in an enforcement notice on a building then under interim protection or temporary listing.

Section 80 — Compensation for loss or damage caused by interim protection

287. Under this section, if the Welsh Ministers decide not to list a building and serve notice under section 79(5)(b) ending interim protection, any person with an interest in the building when interim protection took effect is entitled, on making a claim for compensation to the Welsh Ministers, to be paid compensation by them for losses or damage directly attributable to the interim protection.
288. Subsection (5) establishes that, in those cases where interim protection follows on from temporary listing, the compensation claims made to the Welsh Ministers may include losses or damage attributable to or suffered as a result of the temporary listing.
289. [Sections 202](#) and [203](#) make additional provisions about claims for compensation under this Act (see paragraph 45 above).

Section 81 — Review of decision to list building

Section 82 — Supplementary provision about reviews

Schedule 2 — Decision on review by person appointed by the Welsh Ministers

290. Where the Welsh Ministers list a building, section 81 requires them to give any owner or occupier of the building an opportunity to request a review of their listing decision.
291. Subsection (2) provides that the ground for review is that the building is not of special architectural or historic interest. Subsection (6) provides that the Welsh Ministers may make regulations to specify other grounds in the future.
292. Under subsection (3), the Welsh Ministers must appoint a person to carry out the review and make a decision on it. Ordinarily, this will be an inspector of Planning and Environment Decisions Wales. However, subsection (4) provides that the Welsh Ministers may make regulations to specify descriptions of cases that they will review and decide themselves, instead of appointing a person to do so.
293. [Section 82](#) makes administrative and procedural provision for the reviews provided for in section 81. It is supplemented by Schedule 2, which sets out the functions of persons appointed by the Welsh Ministers to carry out reviews. Schedule 2 also applies to reviews of decisions to add monuments to the schedule.

Section 83 — Service of temporary listing notice

Section 84 — Temporary listing in urgent cases

294. [Section 83](#) allows a planning authority to confer temporary listed status on an unlisted building that it considers to be:
- a. of special architectural or historic interest, and
 - b. in danger of demolition or alteration that would affect that interest.
295. This section and section 84 provide planning authorities with powers to take prompt action, informed by their local knowledge, to protect historic assets that they consider to be of special architectural or historic interest. It allows works to the building to be regulated while it is under consideration for listing by the Welsh Ministers.

296. [Section 83\(2\)](#) provides for the service of a temporary listing notice by a planning authority. The notice was previously termed a “building preservation notice” in section 3A of the 1990 Listed Buildings Act.
297. Subsections (2) and (3) detail the required recipients and contents of a temporary listing notice. Subsection (3)(a)(ii) establishes that the temporary listing of a building must be accompanied by a request to the Welsh Ministers to consider the building for listing.
298. Once the requisite notice has been served on every owner and occupier of a building, its effect is that the same restrictions and requirements apply to a building under temporary listing as to a building under interim protection (subsection (4)) — see paragraph 280 above.
299. Subsection (6) excludes scheduled monuments and exempt religious buildings (as defined in section 156(1)) from the scope of temporary listing.
300. [Section 84](#) provides that where a planning authority considers it urgent to protect a building through temporary listing, it may give notice of the temporary listing by attaching the notice to, or near to, the building instead of serving it on each owner and occupier.

Section 85 — End of temporary listing

Schedule 7 — End of interim protection or temporary listing for buildings

301. [Section 85\(1\)–\(3\)](#) identifies three ways in which temporary listing may come to an end. It may:
- a. expire at the end of six months from the day it took effect unless ended earlier;
 - b. be superseded and replaced by interim protection if the Welsh Ministers serve notice under section 78(1) of a proposal to list the building; or
 - c. if the Welsh Ministers give notice to the planning authority that they do not intend to consult on a proposal to list the building, end on the day specified in the notice.
302. [Schedule 7](#), which is introduced by subsection (4), makes provision about the effect of interim protection or temporary listing coming to an end without the building being listed; it has already been discussed in paragraphs 283–6 above.

Section 86 — Compensation for loss or damage caused by temporary listing

303. If a temporary listing comes to an end after six months or because the Welsh Ministers decide not to consult on a proposal to list the building, any person who had an interest in the building when the temporary listing took effect is entitled, on making a claim for compensation to the planning authority in whose area the building is situated, to be paid compensation by it for losses or damage directly attributable to the temporary listing (section 86(1)–(3)).
304. If, however, interim protection follows on from temporary listing and the Welsh Ministers eventually decide not to list the building, compensation would be available under section 80 instead.
305. [Sections 202](#) and [203](#) make additional provisions about claims for compensation under this Act (see paragraph 45 above).

Section 87 — Certificate that Welsh Ministers do not intend to list building

306. Under section 87, the Welsh Ministers may, on the application of any person, issue a certificate stating that they do not intend to list a particular building. The effect is that for 5 years the Welsh Ministers may not list the building and the relevant planning authority may not list the building temporarily. Such an application equates to a person

*These notes refer to the Historic Environment (Wales) Act
2023 (c.3) which received Royal Assent on 14 June 2023*

asking the Welsh Ministers to consider the building for listing and if the building is judged not to meet the listing criteria a certificate may be issued. This provides certainty for a person wishing to develop or undertake works to a building, or to develop the land on which it is situated, that the building will not be listed for the next 5 years.