

HISTORIC ENVIRONMENT (WALES) ACT 2023

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 — Buildings of special architectural or historic interest

Chapter 4 — Enforcement of controls relating to listed buildings

438. Listed buildings are nationally important and irreplaceable historic assets. It is a criminal offence to carry out unauthorised works to a listed building, which can destroy the historic fabric (meaning the historic evidence provided by the physical elements of the building) and damage the special interest of listed buildings. This Chapter sets out a number of offences relating to listed buildings, including the offences of carrying out unauthorised works, failing to comply with a condition of a listed building consent (section 117) or deliberately damaging a listed building (section 118).
439. This Chapter also provides planning authorities with the powers to issue a temporary stop notice to put an immediate halt to works that either breach section 88 or a condition of a consent (sections 119 to 122).
440. The Chapter also provides the power for a planning authority to issue enforcement notices (section 123). Such notices may be issued if a planning authority considers that works which involve a breach of section 88, or of a condition subject to which listed building consent has been granted, have been or are being carried out in relation to a listed building in its area. The enforcement notice can be issued, if appropriate, having regard to the effect of the works on the character of the building as a building of special architectural or historic interest. An enforcement notice must specify steps to be taken to remedy the effects of unauthorised works. Section 124 provides for the service and taking effect of an enforcement notice, and section 127 establishes a right to appeal against an enforcement notice. The Chapter provides arrangements for compliance with enforcement notices and a power for the Welsh Ministers to issue enforcement notices (sections 130 to 134).
441. Finally, the Chapter provides for injunctions to restrain an actual or expected breach of section 88 or an actual or expected failure to comply with a condition of listed building consent for works to a listed building (section 135).

Section 117 — Offence of carrying out unauthorised works or breaching condition of consent

442. [Section 117\(1\)](#) makes it an offence for a person to carry out, or cause to be carried out, works in relation to a listed building in breach of section 88. This includes any works that would affect its character as a building of special architectural or historic interest.
443. If listed building consent has been granted, subsection (2)(b) provides that it is an offence for a person to fail to comply with a condition of a consent in carrying out works, or in causing works to be carried out.

444. For the purposes of this section, a “person” may be anyone who undertakes works to a listed building, be that an owner or occupier of a building, a contractor or subcontractor or other third party.
445. If works are undertaken to a listed building without authorisation or in breach of a condition subject to which listed building consent has been granted, a person commits an offence if they:
- a. carry out those works personally, or
 - b. instruct or employ someone to undertake them.
446. Consequently, both an owner and a builder instructed by the owner to undertake unauthorised works could be guilty of an offence.
447. Subsection (4) provides a person with a defence for an offence under this section if works were undertaken to address urgent health and safety needs or for the preservation of the building. However, the defence is only available where the works were limited to the minimum measures immediately necessary to secure health and safety or the preservation of the building, and notice was given to the planning authority in whose area the building was situated, with detailed justification for the works, as soon as reasonably practicable.
448. Subsection (5) provides a person with a defence for an offence under this section relating to a building under interim protection where the person proves that they did not know, and could not reasonably have been expected to know, that the building was subject to interim protection. Where the defence is raised by a person on whom a notice of interim protection should have been served, it is for the prosecution to prove that the notice was served on the person.
449. Information on buildings under interim protection should be readily available. Section 78 requires the Welsh Ministers to serve notice if they propose to add a building to the list. The notice, which must be served on every owner and occupier of the building amongst other persons, has to specify the date upon which interim protection begins and explain its effect. A list of buildings under interim protection is published on the Cadw website in accordance with section 79(4)(a) (see paragraph 281 above) and Cof Cymru also displays buildings under interim protection.
450. Subsections (6) and (7) detail the levels of penalties a person guilty of an offence under this section is liable to, whether on summary conviction or conviction by indictment. Since unauthorised works to a listed building may be prompted by the prospect of financial gain, the courts are to have regard to any financial benefit the person convicted may have gained or appears likely to gain as a result of the offence, when determining the amount of any fine to be imposed (subsection (7)).

Section 118 — Offence of intentionally damaging listed building

451. [Section 118\(1\)](#) provides that a person commits an offence, if, with the intention of damaging a listed building, such a person does anything, or permits anything to be done that causes or is likely to result in damage to that building, and were it not for this subsection, the person would have been entitled to do or permit such action. A person entitled to do or permit an action to a listed building in this case would include an owner, occupier or someone employed by them.
452. The manner in which the offence under this section has been limited to persons who are entitled to do or permit works to a listed building, distinguishes it from the more broadly framed offence under section 1(1) of the [Criminal Damage Act 1971 \(c. 48\)](#) (“the 1971 Act”). The offence in the 1971 Act applies to any person who “without lawful excuse destroys or damages any property belonging to another”. Another important difference between the two offences is that intention must be proved for an offence under this

section, while recklessness as to whether damage is caused is sufficient for the offence under section 1 of the 1971 Act.

453. Subsection (3) provides that a person found guilty of an offence under subsection (1) will be liable on summary conviction to a fine not exceeding level 3 on the standard scale.
454. If, on being convicted of an offence under this section, the person also fails to take reasonable steps that are necessary to prevent damage or any further damage from taking place to the building, the person is liable on summary conviction to further fines for each day on which the failure continues (subsections (4) and (5)).
455. [Section 118](#) does not apply to a building subject to interim protection or temporary listing — see sections 79(2) and 83(4).

Section 119 — Power of planning authority to issue temporary stop notice

456. [Section 119](#) gives a planning authority the power to issue a temporary stop notice to put an immediate halt to any or all works to a listed building that they consider to be unauthorised or to contravene a condition of a granted listed building consent. The planning authority may only issue a notice if it considers that the works ought to be stopped immediately, having regard to the effect of the works on the character of the building as one of special architectural or historic interest.
457. Subsections (2) to (4) specify the required content of a temporary stop notice and make provision for display of a notice. The works specified in the temporary stop notice need not include all of the works that are underway. For example, a planning authority may wish to stop the alteration or removal of a particular feature, such as a window, which is part of a wider programme of works, but may be satisfied that the remainder of the programme of works has been authorised by listed building consent or consists of simple repairs that will not affect the character of the building.
458. Subsection (3) requires the planning authority to display a copy of the notice on the listed building and the copy must specify the date on which it is first displayed. Subsection (4) however provides that if it is not reasonably practicable to display a copy of the notice on the building or its display on the building might cause damage, the authority may instead display a copy in a prominent place as near to the building as is reasonably practicable.
459. While the planning authority may serve copies of the notice on interested parties under subsection (5), only display of a copy of the notice as specified in subsection (3) is needed for the immediate suspension of the specified works.

Section 122 — Compensation for loss or damage caused by temporary stop notice

460. [Section 122](#) provides that any person with an interest in a listed building may, in limited circumstances, be entitled to compensation from the planning authority for loss or damage directly attributable to the effect of a temporary stop notice.
461. Subsection (1) provides that compensation is only payable where:
- a. the works specified in the notice did not breach section 88 at the time the notice took effect (that is, they were either authorised or did not require authorisation); or
 - b. the works specified in the notice did not contravene a condition of a listed building consent at the time the notice took effect; or
 - c. the planning authority withdrew the temporary stop notice after it took effect.
462. A planning authority might withdraw a temporary stop notice after it takes effect if, for example, it discovers that the notice was displayed in error because works were not unauthorised or the notice was brought into effect for the wrong property.

463. Subsection (2) further provides that no compensation is payable if the planning authority withdrew the temporary stop notice after listed building consent was granted that would allow the works specified in the notice to proceed. This exception applies only if the consent was granted after the temporary stop notice had taken effect; if the consent was granted first, compensation may be payable.
464. If a planning authority is liable to pay compensation under section 122, section 171(3) provides that, under certain circumstances, the Welsh Ministers may contribute towards the payment of the compensation or direct that another local authority contribute an amount to the payment.
465. [Sections 202](#) and [203](#) make additional provisions about claims for compensation under this Act (see paragraph 45 above).

Section 123 — Power of planning authority to issue enforcement notice

466. [Section 123](#) gives a planning authority the power to issue an enforcement notice to require steps to be taken where it considers that unauthorised works have been carried out on a listed building. The planning authority must consider it appropriate to issue the notice, having regard to the effect of the works on the character of the building as one of special architectural or historic interest. The planning authority, accordingly, may weigh up factors such as the severity of the damage to the listed building and the likelihood of future harm, the impact of the damage on the listed building's character and significance, the scope for negotiation and cooperative solutions and the availability and suitability of other legal remedies.
467. An enforcement notice must identify the alleged breach and require steps to be taken for any or all of the following purposes:
- a. restore the listed building to its condition before the unauthorised works took place;

The steps specified would be likely to include undertaking appropriate recording and investigation of the damaged area to recover and record historical evidence before further specified operations proceed.
 - b. alleviate the effect of the works, if restoration is not reasonably practicable or desirable; or

In the event of serious or extensive damage to a listed building, restoration might be unviable and could, in fact, cause further harm to the special interest of the listed building. In such a case, the planning authority would specify steps to stabilise the building in its altered state to protect it and the special interest it contains for the future.
 - c. put the building in the condition in which it would have been if the terms and conditions of a granted listed building consent had been complied with.

Section 124 — Service and taking effect of enforcement notice

468. [Section 124](#) sets out the requirements for service of a copy of an enforcement notice and when a notice takes effect.
469. Subsection (2) provides that an enforcement notice will take effect at the beginning of the day specified in the notice. Should an appeal against the notice be made to the Welsh Ministers, section 127(4)(a) provides that the notice will not take effect until the appeal is finally determined or withdrawn. However, should an appeal against a decision of the Welsh Ministers on an enforcement notice be made to the High Court, section 184(5) provides that the Court may order that the enforcement notice is to have effect, either in full or to the extent specified in the order.

470. Subsection (3) provides that an enforcement notice can set different periods for taking different steps. Such flexibility enables an enforcement notice to make appropriate provision for the conservation requirements of a building. For instance, a phased series of steps might be set to achieve the satisfactory restoration or stabilisation of a building damaged by unauthorised works.
471. Subsection (4) requires a copy of the notice to be served on every owner and occupier of the building and any other person who has an interest in the building that the authority considers to be materially affected by the notice.
472. Subsection (5) requires a copy of the notice to be served before the end of 28 days after the day on which it was issued, and at least 28 days before the date specified in the notice as the date on which it is to take effect. “Issued” here means when the enforcement notice was agreed by the relevant committee or delegated officer of the planning authority.

Section 126 — Effect of granting listed building consent on enforcement notice

473. **Section 126** provides for a situation where, after an enforcement notice is issued, listed building consent is granted under section 89(2) to authorise works to which the notice relates.
474. In practice, consent under section 89(2) is only granted in exceptional circumstances and when the works undertaken have been for the benefit of the listed building.
475. Subsection (2) provides that requirements of the notice that are inconsistent with the new consent cease to have effect. However, subsection (3) sets out that a person remains liable for any earlier offence arising from a failure to comply with an enforcement notice, even though part or all of the notice subsequently ceases to have effect under this section. Failure to comply with an enforcement notice (section 133) is a separate offence from carrying out unauthorised works (section 117) or of intentionally damaging a listed building (section 118) and proceedings for the offences may be pursued independently.

Section 127 — Right to appeal against enforcement notice

476. **Section 127** permits anyone who has an interest in the listed building to which an enforcement notice relates to appeal to the Welsh Ministers against the notice. This includes owners, lessees and tenants, official receivers and mortgagees and other lenders.
477. Subsection (1)(b) also provides that any person, who by virtue of a licence occupies the building on the day on which the notice is issued and continues to occupy it when the appeal is made, may appeal to the Welsh Ministers against an enforcement notice.
478. Subsection (2) lists the permissible grounds for an appeal.
479. Ground (a) allows the listing of the building to be challenged. An appellant resorting to ground (a) would need to demonstrate that the building is not of special architectural or historic interest. In making the case, consideration must be given not only to the building itself, in its condition prior to any unauthorised works taking place, but also to any contribution made by associated structures or artificial objects in the curtilage of the building. If an appeal on this ground is successful, the Welsh Ministers will delist the building (see section 128(3)(c)).
480. Ground (b) permits an appellant to challenge an enforcement notice by contending that the matters alleged to have constituted a breach of section 88 or a condition of a listed building consent never took place.
481. Ground (c), on the other hand, allows an appellant to argue that those matters, if they occurred, did not constitute a breach. An appeal could be made, for example, if works took place, but they did not affect the character of the building as one of special

architectural or historic interest. Ground (c) will also accommodate appeals arguing that a breach did not occur because the building in question is not listed or that what has been listed is not a building. Such situations were considered and recognised as legitimate grounds for appeal in *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] 1 WLR 2206.

482. Ground (d) allows an appeal on the basis that the works to which the enforcement notice relates were urgently necessary for health and safety or the preservation of the building, those objectives could not be secured by works of repair or to provide temporary support or shelter and the works undertaken were limited to the minimum measures necessary.
483. Ground (e) provides for circumstances in which the appellant maintains that listed building consent should be granted for the unauthorised works to which an enforcement notice relates or a condition of a granted consent should be removed or replaced. Such an appeal might be made if the works in question had a neutral or beneficial effect on the character of the listed building.
484. Ground (f) permits an appeal if a notice was not served on a person as required under section 124. That section requires service on every owner and occupier and any other person with an interest in the building whom the planning authority considers will be materially affected by the notice. However, section 128(4) establishes that if the failure to serve an enforcement notice on a person is a ground for an appeal, the Welsh Ministers may ignore the fact if neither the appellant nor that person has been substantially prejudiced by the failure.
485. Ground (g) provides for an appeal on the ground that steps required in an enforcement notice would not serve the purpose of restoring the character of a building. This would allow an appellant to challenge, for example, an enforcement notice that required the reconstruction of a demolished feature using all of the broken pieces with resulting joins and cracks. The appellant might argue that a faithful replica of the feature, without the distracting joins and cracks, would more fully restore the character of the building.
486. Ground (h) provides that an appeal can argue that remedial steps detailed in the notice under section 123(3) exceed what is necessary to restore the listed building, alleviate the effect of the breach, or put the building into the condition it would have been in if conditions attached to a consent had been fulfilled.
487. Ground (i) allows for an appeal on the basis that the period within which the notice requires any step to be taken is unreasonably short. Successful appeals on ground (i) almost invariably lead to enforcement notices being varied to allow for longer periods in which to carry out the specified works and are unlikely to result in notices being quashed.

Section 128 — Determination of appeal

488. **Section 128** provides Welsh Ministers with the power to determine an appeal against an enforcement notice.
489. Subsection (1) provides that the Welsh Ministers may correct any defect, error or misdescription in the notice to which the appeal relates, or vary the terms of the enforcement notice, if they are satisfied that such steps will not cause injustice to either party to the appeal.
490. Subsection (6) clarifies that the decision of the Welsh Ministers on the appeal is final.

Section 130 — Order to permit steps required by enforcement notice

491. **Section 130** allows an owner of land to apply for an order from a magistrates' court requiring another person who has an interest in the land to allow the owner to take steps required by an enforcement notice. If it is satisfied that the owner is being prevented from taking the required steps, the court may make such an order.

492. This provides an important legal recourse for an owner of land, since section 133(1) places any liability for an offence for a failure to comply with an enforcement notice on a person who is at the time an owner of the listed building to which the notice relates.

Section 131 — Power to enter land and take steps required by enforcement notice

493. **Section 131(1)** provides for a situation in which a step required by an enforcement notice has not been taken within the time prescribed. In such a case, the planning authority may enter the land to which the enforcement notice relates at any reasonable time and take that step. This allows necessary conservation works to secure the special interest of the listed building that are detailed in the enforcement notice to take place in a timely fashion.
494. Subsections (2) and (3) provide that it is an offence to intentionally obstruct a person exercising the power under subsection (1) and that a person found guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Section 132 — Recovery of costs of compliance with enforcement notice

495. **Section 132** provides for the recovery from any owner of reasonable costs incurred by a planning authority after exercising the power in section 131 and entering land to take the steps required to comply with an enforcement notice.
496. Subsections (2) and (3) provide for the recovery of such costs from an owner of the land acting as an agent or trustee for another person, or from that other person, or from a combination of the two.
497. The section also provides for the recoverable costs to be a local land charge until such time as they are recovered (subsections (5) and (6)).
498. Finally, the section provides for certain circumstances whereby the planning authority may recover some or all of its costs by selling materials recovered while undertaking the steps required following a failure to comply with an enforcement notice. If there is any surplus after deducting the recoverable costs, the remaining proceeds must be paid to the person who owned the materials (subsections (7) and (8)).

Section 133 — Offence of failing to comply with enforcement notice

499. **Section 133** establishes that if, after the end of the period prescribed in an enforcement notice, a required step has not been taken, an owner of the listed building to which the notice relates will be guilty of an offence. This would be an offence in addition to the offence of carrying out the unauthorised works under section 117.
500. Subsection (2) provides that an offence under this section may be charged by reference to a day or a longer period, and that a person may be convicted of more than one offence in relation to the same enforcement notice by reference to different periods.
501. Subsection (3) sets out the possible defences available under this section. It is a defence for a person to prove that:
- a. the person did everything that could be expected to be done to secure that the required steps were taken, or
 - b. the person was not served with a copy of the notice and so was unaware of its existence.
502. Subsection (4) provides that the penalty for the offence of failing to comply with an enforcement notice, whether on summary conviction or conviction by indictment, is an unlimited fine.

503. Since deliberate damage to a listed building may be prompted by the prospect of financial gain, subsection (5) requires the court to have regard to any financial benefit the person convicted may have gained or appears likely to gain as a result of the offence, when determining the amount of any fine to be imposed.

Section 135 — Injunction to restrain unauthorised works or failure to comply with condition of consent

504. **Section 135** allows a planning authority to apply to the High Court or the county court for an injunction to restrain actual or expected unauthorised works or actual or expected works that fail to comply with a condition of a listed building consent.
505. Subsection (2) establishes that a planning authority may apply for an injunction irrespective of whether it has used or proposes to use any other powers provided by this Part — for instance, an enforcement notice (section 123) or urgent works (section 144).
506. The court may grant the injunction on any terms it considers appropriate to restrain the breach and issue it against a person whose identity is unknown (subsections (3) and (4)). This will make it easier to obtain an injunction in timely fashion if it is needed to put a halt to works that threaten to damage the special architectural or historic interest of a listed building.