



· INSTITUTE · OF · HISTORIC ·
BUILDING · CONSERVATION



IHBC GUIDANCE NOTES

Practical Guidance for bringing Listed Building Prosecutions

GN2017/1
Mar 2017

This is one of a series of occasional IHBC Guidance Notes published by the Institute of Historic Building Conservation (IHBC). IHBC Guidance Notes offer advice on topics that we consider crucial to the promotion of good built and historic environment conservation policy and practice.

The IHBC welcomes feedback, comment and updates on our Guidance Notes to our consultant editor Bob Kindred, at research@ihbc.org.uk

Executive Summary

1. This Guidance Note is intended to supplement, and be read in conjunction with, the relevant part of the Historic England document '*Heritage Crime – Guidance for Sentencers*' 2017 relating to listed building and conservation area offences [1]. While that document addresses heritage crime more widely it makes no reference to the Institute's National Database of Listed Building Prosecutions [2]. Nor is it instructive regarding the day-to-day practicalities of investigation or in the preparation for court cases by local planning authority heritage specialists. The purpose of this guidance note is therefore to address many these issues.

2. This Note does not deal with cautions for which a separate IHBC Guidance Note has been prepared at: http://ihbconline.co.uk/toolbox/guidance_notes/cautions.html

The IHBC National Database of Listed Building Prosecutions

3. The National Database of listed building prosecutions was established in 1996 in response to a lack of data on local authority activity. Its inception was prompted at the time by a pending (and ultimately) successful local authority prosecution of a serving Member of Parliament for multiple listed

building offences.

4. The database now contains nearly 250 cases and is accessible online via the IHBC website at www.ihbc.org/resources/resources.html providing Tables of the sizes of fines, and fines listed chronologically.

5. During the deliberations on sentencing in a case in Twickenham brought by Richmond on Thames London Borough Council in 2011, the Judge remarked that more detail about specific past cases (beyond the data in the IHBC's Tables) would have been of assistance. To facilitate this the IHBC website now also contains a more detailed illustrated commentary on a number of past cases. This is also accessible via the IHBC web-link above.

Introduction to Best Practice and Guidance

6. Faced with a breach of listed building control, local planning authorities obviously need to consider whether to take enforcement action or institute proceedings to prosecute or both. Some unauthorised works may stem from a genuine mistake by the perpetrator and/or may be minor in nature. These may be resolved by remediation by a Listed Building Enforcement Notice or, if appropriate, the works may be granted consent in retrospect.

7. Enforcement may be intrinsically desirable for the benefit of the historic integrity of the building in question but unauthorised work may often destroy historic fabric, the special architectural and historic interest of which cannot be restored by these means [3]. In more serious cases, including those where reinstatement is not possible or impracticable, or post-facto approval is not appropriate, successful court action will need to be considered.

8. Practitioners are also reminded that a "well publicised successful prosecutions can provide a valuable deterrent to willful damage to, or destruction of, listed buildings, and it is the Secretary of State's policy to encourage proceedings where it is considered that a good case can be sustained". This sound advice from September 1994 in Planning Policy Guidance Note 15 remains entirely valid notwithstanding the replacement of the document in turn by Planning Policy Statement 5 and the National Planning Policy Framework (NPPF) [4].

9 Practitioners should also note the Department of Communities and Local Government's 'Best Practice Guidance on Listed Building Prosecutions' (2006). Although this invaluable document was withdrawn in March 2014 as part of the government's 'bonfire of red tape' it remains accessible at: <https://www.gov.uk/government/publications/listed-building-prosecutions-best-practice-guidance>

Procedural issues

10. It is helpful, but by no means axiomatic, if the local planning authority has an enforcement protocol or formally approved policy to ensure the fair, proportionate and consistent treatment offenders. Such a protocol or policy is helpful as a defence against challenge by Judicial Review - particularly if the authority is not acting with due diligence or was insufficiently active in dealing with enforcement cases in the past. It is also a reassurance to elected members especially where decisions to prosecute are delegated to Council officers. It will be up to each individual local authority to determine if the nature of the protocol or policy also meets the terms of the enforcement plan envisaged in paragraph 207 of the NPPF.

11. A set of sound working practices for the management of such cases is essential. While all of the following steps do not always need to be followed, experience has shown that many pitfalls can be overcome by adhering to these tenets. When a potential case of unauthorised work to a listed building (or the demolition of an unlisted building in a conservation area) comes to light - and generally irrespective of the chosen method of resolution - in the initial stages, the following pointers are recommended:

a) Timing is of the essence

It is crucial to determine immediately what needs to be done, including many of the steps listed below. Time can fundamentally affect the success of whatever follows regardless of the nature of the breach and the strength of the case etc. This can include the time lapse between the works being carried out and the breach being noticed as well as the time taken to serve a formal Notice.

b) Speed

Damage is often irreversible and so it is essential to visit the site quickly. This should be prioritised over everything else if only in the first instance to make a photographic record of the nature of the breach so these images (or indeed video footage taken on e.g. a smart phone) can be used or referenced later. Prompt action, particularly if work is in progress or building materials or fixtures remain dumped on site, is essential.

(Note: Remember that if there is any possibility of being denied access that the powers under S.88 and 88A of the Planning (Listed Buildings and Conservation Areas) Act 1990 can be invoked to gain entry. Access must be at any reasonable time, but if there is any suspicion that evidence e.g. in the form of materials or fixtures may be removed from site, a surveillance operation may be required and/or, in extreme cases, a warrant can be obtained to enable access.)

c) Record making

Take as many photos as possible and make sure these are all dated, their location and subject described & they are saved on an easily locatable file accessible to other officers. Bear in mind that if ultimately, the case goes to court, good sized, clear photos of the feature or the building will assist the Magistrates to visualize the building. Notes made on the dictation facility of a smart phone either about the works or the photos or both, even if hastily made, may be a useful aide memoir at a later date in fleshing-out an audit trail.

d) Audit trails

Note all conversations with owners, occupiers, agents and contractors on file and do it promptly while memories are fresh. Potential defendants should be informed categorically that unauthorised works may have taken place [\[5\]](#) and may result in formal Council action and that cooperation

would be preferred. Explain that the Council should always be spoken to before acting etc. and follow this up in writing. There must be an effective audit trail for whatever action may follow and it is essential that everyone involved is fully aware that consent is required for any works of alteration or demolition should have been applied for prior to commencement. It is important that there should be no doubt about the status of any work already carried out to eliminate claims of “ignorance” at a later date.

e) Police & Criminal Evidence (PACE)

While Council officers are entitled to ask questions on site (& these should then be noted on file promptly thereafter) any interviews under caution must be by invitation to the Council’s offices. Defendants are not obliged to attend such interviews. All interviews should be with two officers present & be recorded. The relevant Council officers should ensure that their PACE training is up-to-date & that the proper procedures are followed. An outline of PACE, the admissibility of incriminating statements and an exemplar are given in Appendix One.

f) Clarity of leadership

In smaller local authorities with limited enforcement and/or heritage management resources and where heritage enforcement may traditionally have been a low priority, it may not always be clear where the initiative to investigate breaches may lie. It is therefore essential to immediately decide who the lead case officer will be. Once this is established, all matters should be directed through, or communicated via that person throughout. Where the authority has greater personnel resources, or wider skill sets can be drawn upon and where several officers will be making an input, it is best to establish a “working group” to maintain momentum and ensure regular updates to those such as legal services who may only be intermittently involved. At the close of every such meeting ensure there is a record of who will do what next and, where practicable, within an agreed timescale.

g) Calculation of the authority's costs

Officer time devoted to the case is a cost to the Council that might otherwise be devoted to other more proactive workload. At the earliest opportunity the case officer should establish a schedule or spread sheet of the number of hours expended on the case and the related hourly wage rates. This should include the time required for site visits; report and witness statement writing; case conferences etc. This will provide a detailed justification for any claim for costs by the Council of bringing the case to court. While the Council may not necessarily recover all of its costs it may be able to recoup a substantial proportion and this will also in effect represent an additional 'fine' for the defendant. Where a significant level of investigation and/or case preparation is required, the outcome may result in the local authority's recovered costs being greater than the fine [\[6\]](#).

h) Taking legal advice as soon as possible

Legal advice may be provided within the authority (where there may be a specialist prosecuting solicitor), or by a joint local authority consortium service, or be outsourced. It is unlikely that the provider will be as familiar with breaches of listed building control as with offences under other legislation and so it is essential that a proper briefing is provided. (Further pointers about this are given in Appendix Two.) The quality of the advice & assistance received will be dictated by the information initially supplied by the enforcement case officer to the legal team. If good intelligence has been gathered including photos and well organised, chronologically arranged, file notes it should be possible to present legal services with an audit trail that sets out a coherent and convincing narrative. Start from the beginning but don't automatically assume that the authority's solicitor will intuitively fill in the gaps. Make sure legal services are told anything that is considered relevant and ensure the heritage issues & background are fully understood including aspects that need emphasis so as to avoid any pitfalls that might arise from not having seen the building prior to the removal or alteration of the historic detail referred to in the listing description or record photos etc.

i) Being prepared to challenge opinions

Heritage related prosecutions are infrequent and the process and legislative provisions may not necessarily be embedded in the workings of the Council (especially where there is a lack of continuity of advice). Therefore be prepared to challenge anything that might be open to disagreement.

If legal services (or anyone else) states something is considered not to be correct, do not be reticent and question the opinion & suggest an alternative interpretation, and if necessary seek a second opinion as failure to take account of this by more senior officers may compromise the success of the outcome at a later stage. If the issue needs to be referred upward to a

more senior officer do so. A simple example of challenge is given in Appendix Three. Do not sit in silence and regret doing so later as there is a justifiable heritage management objective to achieve. Think of the challenge as positive as it fosters careful thought and a valuable preliminary to the potential scenario of being challenged in court. The process is there so ensure that the case is robust.

j) Professionalism

Dealing with heritage enforcement cases can be stressful professional experience and involve emotive issues for defendants but however unpalatable such cases may appear, the difficult issues should not be ignored, buried at the bottom of the pile, or avoided entirely. During the course of a professional career these cases may pose ethical dilemmas and emotional tests and there will be attempts to undermine a case officer's expertise and professional standing. In desperation, defendants may try any tactic to delay the case or have it dropped but as an expert in your field it is important that you hold your nerve, remain objective and know you have the support of your authority and professional colleagues including your Institute. If the defendant resorts to any form of intimidatory behaviour, record it and report it to the relevant officers of the Council but also be aware that such action means that in all probability the case will be found in the authority's favour.

k) Avoiding personal interests

Working in one locality for any length of time will inevitably involve direct engagement with a wider variety of local owners and occupiers of heritage assets, but professional ethics and the codes of conduct of the authority and the Institute demand that if anyone is known to you personally or professionally you should not get involved. It should be made explicit that visiting the site to "do someone a favour" is actually not going to help him or her, or you. Should such a situation arise, the case should be passed on to another, impartial officer, thereby avoiding any personal or professional compromises even if these would otherwise be with the best of intentions.

l) Explaining the offence in detail

Unless the case is serious and counsel is employed, the presentation of the case will be made in court by the local authority's prosecuting solicitor. Where a guilty plea has been entered, it may not be necessary for the Council's lead professional officer or other witness for the prosecution to give formal evidence. It should not be automatically assumed that those in court will have any heritage expertise and as indicated in Appendix Two, those listening to the Council's evidence in court will probably know absolutely nothing about listed buildings. Technical terms and the nuances of the operation of the heritage system should therefore be avoided wherever possible.

In essence the objective of the case will be to explain why the offence was wrong, why something that matters has been lost; why there should be a penalty; and why the Council had tried to avoid court action but was left with no choice but to proceed. It can sometimes be lost sight of that it is the Council who is in the right – with a duty to protect the nation’s heritage - and the defendant who is in the wrong.

The Prosecution’s Evidence

12. The evidence will normally be in the form of a signed statement from the investigating officer, usually the heritage specialist. This will normally comprise:

a) Documentary evidence to prove the building is legally listed including the statutory list entry, including the map, and an explanation of what the heritage merit is that has led central government or the devolved administrations (in addition to the respective Council) to determine that the building is worthy of statutory protection.

b) Plans and photographs (as noted in 11 c) above) illustrating the relevant works of demolition, alteration or extension and their context. Photographs should have been meticulously recorded by date to show the location, nature and extent of the works, why these are considered to be unauthorised and what the impact of the works is on the character and appearance of the listed building.

c) Evidence that the works have not received listed building consent and are therefore unauthorised. It can be helpful also to make clear that no advice had been given that listed building consent would not be required as sometimes owners faced with prosecution can say that they spoke to the conservation officer and were told the works didn’t need consent.

d) Evidence that the defendant had executed the works or caused them to be executed. This will usually be the building owner, a relative of the owner, or a contractor or sub-contractor. An agent may also have been involved or may have instructed the works with or without the owner’s knowledge or consent. The Council will not necessarily have direct first hand evidence of this (hence the importance of speed as noted in 11b above). If the evidence is inferential, perhaps derived from an inspection and/or conversations on site and subsequently written up as noted in 11d above it may be necessary, for the avoidance of doubt, to consider arranging a formal interview under caution. See the example given in paragraphs 20-24 of Appendix One.

e) An assessment or report of how the defendant has conducted himself or herself, whilst not overstepping the mark of providing prejudicial evidence

as to motive. This might address issues such as whether the defendant has engaged constructively with the Council's investigation or has been obstructive and made this more difficult. For example this could be by providing false information or by obstructing visits to the site (possibly necessitating the service of a formal notice under S.88A of the Planning (Listed Buildings and Conservation Areas) Act 1990 Act or via a Magistrate's Warrant). The report should address whether the defendant has honored promises made to officers in the past or has behaved in a misleading way or has given an undertaking to halt work only to resume once Council officers have left the site. Also whether the defendant has displayed a familiarity with the planning system and an awareness of, or applications for, consent on listed buildings elsewhere. Whilst this is not strictly relevant to guilt in respect of a strict liability offence, when it comes to sentencing it may demonstrate the defendant's credibility or otherwise particularly if a not-guilty plea has been entered.

One offence or several offences?

13. Consideration needs to be given as to whether the unauthorised works amount to one offence or multiple offences. The local authority's prosecuting solicitor needs to consider whether two or more separate criminal acts may be alleged in one Information (*a formal criminal charge*) or if the defendant's conduct comprised a single activity.

14. Works to listed buildings are often carried out over a period of time and can involve a number of different activities and trades (or in the case of advisors – different professions). In these cases a view may be taken that unauthorised works and/or criminal damage were potentially carried out by different defendants at different times, constituting separate offences.

15. As the Government's 2006 best practice guidance made clear, it is important to give careful consideration to this point since an Information may be invalid if it alleges more than one offence in a single Information. If this scenario were to arise the prosecution might well be asked by the court to pick one offence only on which to proceed, with the remainder being struck out or alternatively and worse still from the authority's perspective, the case might be dismissed.

16. In cases of multiple offences, it may be that when looked at individually few are especially significant but that it is the cumulative effect of all the offences that creates the justification for taking legal action. In such cases, if there is a risk the court will look in isolation at each offence, it is important that the Council's case very clearly sets out the cumulative impact on the listed building of the unauthorised works.

Which Defendant – one or several? individual or corporate?

17. In relation to companies, prosecutions can be brought both against the company as a whole and, either in addition or instead, against individual employees of that company (see S.331 Town and Country Planning Act 1990, as applied by Planning (Listed Buildings and Conservation Areas) Act 1990 S.89(1)) and its directors, such as the Company Secretary, who are personally liable.

18. In rare circumstances it can be difficult to identify who has responsibility for having carried out the unauthorized works. It may be that the person the Council officers are dealing with claims to be only a representative of the owner and it may be that that owner turns out to be an off-shore company with only a mailbox in a far-off country outside the British judicial influence. It can take a huge amount of time and cost to serve Notices on overseas owners and to take them to court.

Newton hearings

19. There may be circumstances in which heritage professionals may be asked to attend a Newton hearing. [7] They are uncommon but can occur because the defendant has made limited admissions or accepts responsibility for only part of the offence but not all of it and the factual evidence is considered conflicting enough to require a judge to determine the impact sentencing.

20. Both sides provide evidence, and the hearing progresses like a regular trial, with the exception that the judge takes the role of the jury. While the Council will usually have evidence to present (e.g. in the form of the heritage officer's witness statement), if for any reason this is not the case, the Council and the defendant will each submit a statement instead. The judge then evaluates all evidence and/or statements before making a sentencing decision.

21. There are risks for the defendant in a Newton hearing as this takes up court time, officer and court resources, and possibly testimony from the Council's expert witness. If the defense is unsuccessful, the credit normally given for a guilty plea (and a lower fine) for saving the court's time would be lost. No such risk exists for the Council.

Bob Kindred MBE BA IHBC MRTPI

Endnotes

[1] Historic England publication HEAG054a, Version 1.0 first published April 2015 Version 1.1 reissued February 2017.

[2] For the purposes of comparison, the IHBC database also gives examples of custodial sentences for works to archaeological sites, and some serious breaches of planning control, particularly works to trees covered by Tree Preservation Orders.

[3] As stated in paragraph 3.47 of Planning Policy Guidance Note 15. Although PPG 15 was withdrawn in 2010 the advice remains entirely sound.

[4] Ibid.

[5] The apparent equivocation stated here is because in any case where proceedings have been brought it will be for the courts to determine if an offence has been committed.

[6] Local authorities should not overlook the provisions of S.36 of the Local Government Act 1974 (one of the few provisions not repealed) that allows local authorities to recover their establishment charges in any case where they are empowered under any enactment to carry out any works or do any other thing on or in relation to any land or building, and by virtue of that or any other enactment are entitled to recover from any person expenses incurred by them in exercising that power.

[7] An uncommon and comparatively modern legal procedure in English law derived from R v. Newton (1983)

Appendix One – PACE (Police and Criminal Evidence)

Procedure

1. PACE can be used to investigate any breaches of the various provisions of the Planning (Listed Buildings and Conservation Areas) Act 1990 that would constitute criminal offences and where proceedings may be contemplated. The Codes most usually associated with listed building offences are 'C' relating to the requirements for the detention, treatment and questioning of suspects; and 'E' which came into effect from 2 February 2016 and outlines the requirements for audio recording interviews with suspects.'
2. As the intention is to establish the facts of the situation as quickly as possible, individuals may be invited to attend a formal interview using the procedures set out under the Police and Criminal Evidence Act 1984 (PACE).
3. Interviews under caution are carried out because there are considered to be grounds, under heritage legislation, to suspect criminal offences may have been committed. This does not mean that the interviewee is presumed guilty and will be prosecuted. It means that the evidence obtained up to that point suggests that the interviewee may have committed one or more offences or may have information relating to these offences.
4. The interview provides the opportunity for the individuals involved to give an explanation of the events that appear to the Council to have occurred.
5. There is no obligation to attend an interview, but failure to do so means that the interviewee will lose the opportunity to provide an explanation.
6. Councils have no power of arrest and individuals are free to leave a PACE interview at any time.
7. Anyone not connected to the case (i.e. anyone not involved with the execution of the works or who had caused them to be executed such as an agent or contractor) can attend the interview. Legal advice can be sought prior to attending the interview and a solicitor/legal adviser may be appointed by the individual to be present.
8. If the person accompanying the interviewee is not a solicitor/legal adviser, their role will be to provide moral support only. They have no right to speak, advise or to ask questions during the course of the interview.
9. It is not usual for a local authority to make provision for childcare at

interviews and it would be exceptional for a PACE interview to be conducted if a dependent child would be present. It will normally be expected that interviewees will make their own arrangements in advance to obviate any problems with childcare that would prevent attendance.

10. Where it becomes evident during the investigations that the potential interviewee has a severe physical, visual or hearing impediment or where English is not the first language it is good practice to request that contact be made with the Council prior to the interview to enable appropriate arrangements for someone to be present who can assist. In Wales this might be about making provision for the interview to be conducted in Welsh.

11. Interviews under caution are usually conducted by one or two investigations staff specially trained to do so. Sometimes joint investigations will be conducted with other agencies and/or other local authorities and if this is so, the Council should ensure this is made clear prior to or at the time of the interview.

12. It is common practice by councils to request that the interviewee's mobile phone (if there is one) is switched off in an interview room.

13. At the commencement of the interview two CDs are unsealed from their packaging in front of the interviewee and placed into a recorder. The recorder is then switched on and recording of the interview will commence.

14. Before questioning begins the interviewer will explain to the interviewee a number of matters. These include that:

- the interview is being recorded;
- the interview is being conducted in accordance with the Police & Criminal Evidence Act 1984 and that a copy of the Codes of Practice for the Act is available for the interviewee to consult;
- the interviewee will be cautioned and advised of his/her rights (i.e. that the person is not under arrest; is free to leave the interview at any time; and, is free to seek legal advice at any time);
- the wording for the caution will be as follows: *"You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say may be given in evidence."*
- the reason[s] why the interviewee has been requested to attend the interview.

15. Interviewees will then be asked questions about themselves before being asked about any suspected offence. Interviewers are not bound to accept the first answer given but are under a duty to try to establish the truth about what has happened.

16. At the end of the interview the interviewee will be asked to sign a paper

seal, which will be used to seal one of the CDs. The interviewee will be given a copy of the CD recording of the interview and be given a form showing what will happen next in terms of the Council's pursuit of the alleged offences.

Practical considerations – rules of evidence

17. Irrespective of the number of past prosecution cases conservation specialists may, or may not have conducted in the courts, the rules of evidence must be respected.

18. In particular, if a council officer seeks to rely upon an incriminating statement made by the defendant to him/her during the course of the Council's investigation, regard must be paid to S.67(9) of the Police and Criminal Evidence Act (PACE). This states: *"Persons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to any relevant provision of a code"*.

19. Whether a Council employee constitutes a person charged with the duty of investigating offences is a matter of fact, however one test is whether a prosecution might result from the investigation (R. v Bayliss [1994] 98 Cr App R 235).

Example

20. A typical example might be where a conservation officer attends a site to assess whether the works have been undertaken in accordance with Listed Building Consent and in the course of this visit talks to the landowner or their representative.

21. Questions revolving around whether the extent of the works is faithfully and fully in accordance with a valid consent are likely to fall under PACE since it may become readily apparent that the landowner may have committed an offence and the questioning will go to the facts of the potential offence.

22. Code C of the PACE Codes of Practice is applicable to the conduct of interviews. The relevant provisions are as follows:

A person whom there are grounds to suspect of an offence must be cautioned (Code C10.1), an interview is the questioning of a person regarding their involvement or suspected involvement in a criminal offence which must be carried out under caution (Code C11.1A), the interviewer should remind the suspect of their entitlement to legal

advice, (Code C11.2).

23. The words of the caution will be familiar to those who watch television police-procedurals. Section 78 (1) of PACE provides that:

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

24. If officers fail to comply with the PACE Code of Conduct, there is a significant risk that any statements made by that individual will be inadmissible in any future criminal proceedings.

Appendix Two – Briefing the Council’s Legal Officer

The following key points should be taken into consideration when briefing the Council’s legal officer (as noted in 11 h) of the Guidance Note above). Some or all of these apply in the practical day-to-day preparation for prosecution cases either for unauthorised works of alteration, demolition or extension under S.9 of the Planning (Listed Buildings and Conservation Areas) Act 1990; or for criminal damage under S.59; or for failing to comply in full with the requirements of a Listed Building Enforcement Notice (LBEN) under S.43.

Most of the specific points given below may be contained within the expert witness statement of the relevant Council officer, but the local authority’s prosecuting solicitor may wish to summarise these points if necessary.

Key points

1. Unauthorised works to listed buildings are absolute offences

The maximum fine in the Magistrates Court is £20,000 or 6 months imprisonment per offence, or in the Crown Court an unlimited fine or up to 2 years in prison (or both). Defendants can also be fined the equivalent of enhanced site value and in addition to the owner, a contractor or professional advisor can also be prosecuted.

2. There is clear legislation and Government policy for the protection of historic buildings

It needs to be emphasised that these are an irreplaceable asset; once lost they are gone for good and therefore every effort should be made to preserve them, as required by the terms of the legislation. The following two summary paragraphs below usefully advanced the argument.

“It is fundamental to the Government’s policies for environmental stewardship that there should be effective protection for all aspects of the historic environment. The physical survivals of our past are to be valued and protected for their own sake, as a central part of our cultural heritage and our sense of national identity.”

“Once lost, listed buildings cannot be replaced; and they can be robbed of their special interest as surely by unsuitable alteration as by outright demolition. They represent a finite resource and an irreplaceable asset. (...) This reflects the great importance to society of protecting listed buildings from unnecessary demolition and from unsuitable and insensitive alteration and should be the prime consideration for authorities in determining an application for consent.”

These are taken from PPG15 and although the government withdrew that document in 2014 it should not inhibit the advancement that these clear and sound principles of appropriate heritage management still apply. If magistrates wish to know the source of these two quotations (paragraph is 3.47) they can be informed.

3. Specific aspects that need to be conveyed to the Court

a) Listing Grade

It is only relevant to emphasise the grade if the case involves a Grade 1 or Grade II* building. [It may only be necessary to emphasise to magistrates that the government makes clear that every effort is warranted to preserve these buildings because they are of special architectural and historic interest – even though the vast majority are Grade II]. On no account should an unnecessary or long-winded explanation of the difference between the grades be made as this is not essential and only has the potential for confusion be sown.

b) Length of time the building has been protected

It may be worth emphasising the date that the building was listed especially if this was long ago (for example having been protected for 40 years +) but the timescale is not necessarily crucial.

c) Highlight the feature(s) involved

If features are specifically mentioned in the statutory list description this may be worth emphasising especially if they are affected by the alleged offence. However, early list entries were more for the purposes of identification than an objective evaluation of a building's special interest and significance. A balanced judgment may be required as to whether this supports the prosecution case, but mention of specific features or fixtures demonstrates that these would have been germane to the decision of the Secretary of State or their devolved administration equivalents to confer statutory protection and are part of the historic authenticity of the building and may contribute to the group value of, for example a farmstead of streetscape.

d) Relevant technical terminology

As noted in 11 I) of the Guidance Note above, it should not be automatically assumed that those in court will have any heritage expertise or that lay magistrates will have any knowledge of listed buildings and their construction. The use of technical terms should therefore be avoided if possible; or where this is not possible, these may need further explanation. It is much better, for example, to refer to 'damage to the beam holding up the front of the building' than just baldly stating this was 'damage to the bressumer'.

e) Uniqueness/rarity of the building

This applies to feature(s) and/or completeness. In England the National Heritage List Online provides a free-text search facility that may enable the rarity of certain building types or individual features; or the placement of the building with the oeuvre of a specific architect etc. to be put in a wider context. It may also be worth stating to magistrates the importance of the patina of age/original craftsmanship etc. that reinforces the special architectural and historic interest and could not be replicated in any reinstatement.

f) Condition of the building

Depending on the extent of the unauthorised works involved it may be necessary to state the physical state of the whole building or the specific part affected. The building may have been familiar to and/or observed by other Council officers from, for example, building control, housing, public health). If the building can be demonstrated to have been in good condition, the point should be emphasised. If this is not the case then it might be better to emphasise that in most circumstances, features can be repaired rather than replaced.

g) When was the most recent inspection

It may be helpful to know the last date the listed building was inspected either prior to the offence, or when unauthorised works were seen to be continuing. It can be helpful to emphasise where external works were involved that there had been a reasonable frequency of inspection - for example as part of an annual Buildings at Risk survey. Prior knowledge about internal works would be less likely but this will depend on the specific circumstances and it might be better not to emphasise this.

h) Delay

The court may wish to know the reason if there has been a significant time delay between the offence taking place and the court hearing. Where the case has necessitated the service of a LBEN it would be important for the council to remind the court that only the threat of prosecution had convinced the defendant to comply - but that in any event the damage had already been done and original features irrevocably lost. Where contact between the Council and the defendant prior to service of the Notice had been protracted (as is quite often the case) the timeline should be explained.

4. Additional matters that may be relevant

a) Clarity of the Notice served

In relation to a prosecution brought for failing to comply with the requirements of a LBEN, it should be made explicit that the local planning

authority's instructions as set out in the Notice Schedule were clear and unambiguous and capable of being complied with in full.

b) Compliance in full

It may be necessary to explain that the LBEN was not complied with [in whole or in part]. The nature of the works to be rectified will determine whether a simple or more detailed explanation to lay Magistrates will be sufficient, but needs to emphasise that what is required is full and detailed compliance by the defendant, not approximation.

c) Parity

In the relatively rare instances of prosecution for criminal damage (where proof of the intention to damage provides a stiffer test) as well as unauthorised works, it is important to emphasise to the court that the government view both offences with equal seriousness.

d) Resources of the defendant

If there is any likelihood of a defendant unjustifiably pleading hardship or concealing their means (to meet a fine and prosecution costs, the local authority may wish to undertake prior investigation into the defendant's resources).

e) History

The local authority may wish to ensure that the relevance of any previous similar offences and dates have been identified should this be required to assist in sentencing.

f) Justification & costs

The local authority will wish to have prepared a detailed breakdown of their investigative and legal costs in bringing the case (see 11g above) to support a request for the recovery of expenditure in bringing the prosecution.

g) Tactics

It is not uncommon for a defendant to change the plea at the last possible moment (usually from not guilty to guilty as this attracts a lower tariff). This assists the local authority in some ways but not in others. In the case of a guilty plea the council's evidence will be accepted but the detail must be robust as the authority will have no comeback if any spurious arguments or questionable facts are advanced in summing up by the defendant or his/her advocate that would undermine the legitimate case advanced by the council.

Appendix Three – Case example of justification for prosecution

1. In the case in question - the local authority's first prosecution - the unauthorised works though minor in physical extent involved irreversible alteration to 16th century historic fabric of a building owned by a well-known local public company.
2. The council's prosecuting solicitor advised that as the works appeared to be small in scale, the instituting of formal proceedings seemed unjustified.
3. The heritage case officer (who had delegated authority) insisted that the case be brought, citing the (then) government guidance that proceedings should be brought where a good case could be sustained and recognizing the value of the attendant publicity for a successful outcome and the potential for obviating other enforcement cases by deterrence.
4. Although the prosecution solicitor agreed to proceed with some reluctance, in court the magistrates were entirely persuaded by the council's case and the defendant was fined a significant sum in the circumstances. This was despite being a first offence and despite entering a guilty plea. The local press prominently reported the outcome.
5. The council's solicitor, having opined that the size of fine was greater than had been anticipated, generously conceded in the light of the verdict that the heritage case officer had been right to insist that the case be brought.
6. The local authority noted that for an extended period thereafter there was a significant decrease in the necessity for similar heritage enforcement.