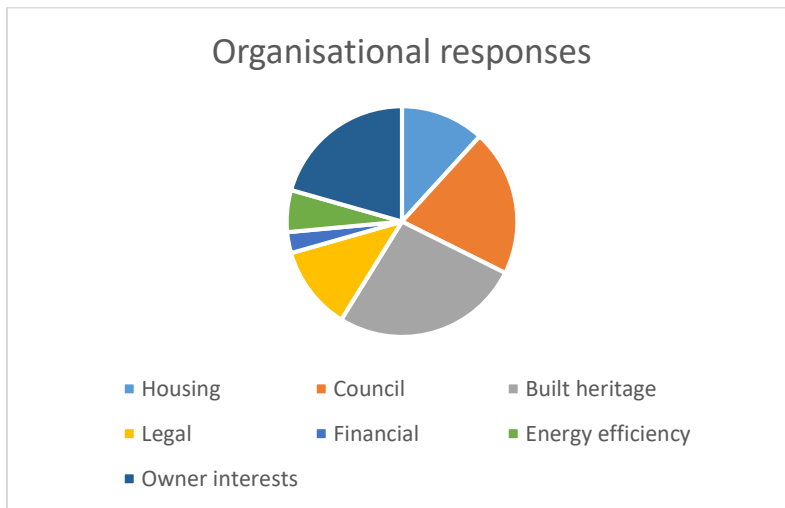


PARLIAMENTARY WORKING GROUP ON MAINTENANCE OF TENEMENT SCHEME PROPERTY: INTERIM RECOMMENDATIONS

ANALYSIS OF RESPONSES TO CONSULTATION (March 2019)

1 INTRODUCTION

1.1 This report provides a summary of responses given to consultation instigated by Built Environment Forum Scotland (BEFS), on behalf of the Scottish Parliamentary Working Group on Tenement Maintenance. 69 responses were received; 34 from organisations, the breakdown of which is given below, along with 35 from individuals – owners, factors, landlords and surveyors.



Key messages are summarised as:

- A welcome initiative – the issue of tenement disrepair needs urgent attention.
- Proposals welcome in principle, but many practical issues that need detailed consideration.
- In the short term, look to expand on existing initiatives that are working.
- Key challenge around introducing significant changes into existing arrangements and the consequent financial impacts for owners and property market.

2 GENERAL

2.1 Welcome principle: The initiative taken by the working group and interim report recommendations were broadly welcomed by consultation respondents. Many supported all three proposals *in principle* as a means of embedding proactive property maintenance and viewed these as a '*step in the right direction*'. However, many practical

issues around implementation were highlighted and for some respondents the proposals were seen as simply not workable.

- 2.2 Key issues: Many respondents were keen to be involved in further engagement around the details of proposals, in order to find practical solutions. Key issues focused around affordability, capacity to deliver, roles and responsibilities, enforcement, proportionality, data protection and culture change. Given practical concerns over implementation, a phased rollout was thought to be the only way of bringing in such changes. A one-size-fits-all approach was deemed problematic.
- 2.3 Extent of disrepair: It is important to recognise the legacy of past public investment in Scotland's tenements, including those that make up much of Edinburgh's world heritage site, in sustaining the historic built fabric that we can appreciate and enjoy today. The value of pre-1919 tenements for their contribution to the historic character of Scotland's towns and cities, and their current contribution to city-centre economic strategies was highlighted. However, the extent of the problem of tenement maintenance especially in mixed tenure blocks in private ownership was widely acknowledged; *'the extent of disrepair is such that doing more of the same is not a viable option'*. It was commented that pre-1919 tenements present the most significant challenge for management issues in mixed tenure blocks, due to the scale and cost of works in these (often listed) buildings. It was reported that widespread consultation with housing associations across Scotland had pointed to the need for legal change to require all owners to take responsibility for and invest in common parts of tenements; while *'in theory owners can come to voluntary agreements to maintain and invest in their tenements, the reality is that this is not happening'*.
- 2.4 Energy efficiency: The potential for this initiative to contribute to wider objectives around fuel poverty and climate change was acknowledged: *'there is an urgent need to improve the energy performance of tenements in order to address climate change and fuel poverty. Tenements make up 24% of the housing stock, with 41% at Energy Performance Certificate Band D or below. We can't afford to let this sector fall behind'*. Proposals for Inspection Reports and Owners Associations would both help secure energy efficiency measures.
- 2.5 Scope: Respondents sought clarity on the scope of the proposals, the report suggesting a focus on privately-owned tenements of traditional build construction. However, the definition of tenement in the Tenements (Scotland) 2004 Act is wide-ranging and includes modern blocks. Respondents questioned whether proposals would be applied in the same way across different types of tenement. It was highlighted that maintenance issues presented in a modern block differ from those in a tenement of traditional construction.

2.6 Impact: While objectives of improving built fabric and energy performance are sound, it was highlighted that proposals would impact on the market value of tenements with properties with less mature funds being at a market disadvantage, potentially causing areas of blight. There would potentially be human cost in terms of financial hardship where owners do not have the disposable income to begin making unbudgeted financial contributions towards property management. Such implications would be most apparent in the short to medium term, when funds have not yet reached maturity. The creation of new mandatory arrangements also needs careful scrutiny within the context of human rights legislation to ensure that no human rights violation occurs; a case may be made in the public interest however proportionality of proposals is a key issue. These implications require detailed consideration and suggestions for further research are given below.

3 INSPECTIONS

3.1 General: Regular Inspection Reports were welcomed as a means of stimulating proactive maintenance and informing potential purchasers around potential repair costs. Funders of repair work highlighted the benefits of Reports as catalysts for action. Examples of regular inspection were cited in France, Finland and the Netherlands. However, issues of cost and adopting a proportional approach were raised, along with how this requirement would be implemented in circumstances where existing factoring arrangements, with planned maintenance regimes, are already in place. Enforcement was seen as a key challenge, with apathy and cost being seen as major barriers. That said, an estimated £1.3million of private investment was reported to have been made during the five-year pilot 'Traditional Building Health Check' scheme in Stirling, indicating that in some circumstances the level of apathy might be less than first anticipated.

3.2 Report content: It was typically felt that Reports should include mandatory costings; also that Reports must be actioned, ie. before a Report is commissioned there must be a willingness and ability to pay for works identified. It would be necessary to find some way to incentivise the implementation of Report recommendations. There was support for using the recognised method for quinquennial reporting and also suggestions to extend the scope to include assessment of energy efficiency, drainage systems and also fire safety measures.

3.3 Skills and equipment to deliver: Inspection Reports should be undertaken by professionals with the relevant qualifications and professional indemnity insurance. Comments were made around the independence of the Reports; that they be standalone and possibly arranged through an independent organisation. The capacity of the sector to absorb what may potentially represent a substantial increase in workload

was highlighted; concerns were expressed around potential for price-fixing/overpricing. This would be not only in terms of surveyors but also contractors with the technical knowledge and skills necessary to undertake work, especially on property of traditional construction. The use of drones was supported as an affordable way in which to gather data on built fabric condition. There is potential to arrange shared resourcing of access equipment (cherry pickers, mobile platforms), to enable affordable high-level access for basic maintenance such as gutter clearing and window repair.

- 3.4 Practicalities: Practicalities around commissioning Reports, arranging access, arranging payment and keeping a data log require discussion. The need for an Owners Association to sign off the Report was queried – there would need to be a procedure for managing decision-making, particularly around managing different views on report recommendations, priorities and standards of work. There was suggestion of the need for second opinion on report findings; also requests that Reports be written in plain English and that part of the process should involve the surveyor helping owners to understand the content of Report recommendations.
- 3.5 Home Reports and Energy Performance Certificates (EPCs): Linkage with Home Reports would be necessary in order to give potential purchasers a better understanding of condition and maintenance and management arrangements. There was a general preference to keep the two reports separate; Home Reports tending to understate significantly the poor condition of common parts of tenements. The relationship with energy performance was highlighted – some adaptations being detrimental to pre-1919 tenements. There could be potential to link EPC requirements with Inspection Reports.
- 3.6 Standards and scope: There was general support for using BS 7913 (Guide to the Conservation of Historic Buildings) as a standard for assessing the condition of pre-1919 tenements. Respondents were keen that proposals not be restricted to A-listed tenements, since these represent a relatively low number and the problem of disrepair and inappropriate maintenance is far more extensive. Under housing legislation it was acknowledged that standards of maintenance for tenements are poorly defined – the only universal standard being ‘tolerable standard’, the purpose of which is to identify homes unfit for habitation. There was also reference to American ‘minimum maintenance codes’ which are designed to combat area-wide blight.
- 3.7 Data: There was recognition that the proposals have significant implications for privacy and compliance with data protection legislation. There were mixed views on the extent to which data generated through the proposals should be made publicly available. Options discussed included an online national searchable database, or more targeted provision of information to prospective purchasers and neighbours. Data relates not only to the Inspection Report, but also building log book and other information on works undertaken, valuations, owner contact details, details of insurance cover, size of Sinking Funds. There was reference to useful work being undertaken by Edinburgh City Council

and the Information Commissioner regarding the release of property owner names to co-proprietors, in relation to enabling common repair work. There is also room to improve the existing process of landlord registration.

4 OWNER ASSOCIATIONS

- 4.1 General: While many respondents indicated support for the principle of compulsory Owners Associations, there were concerns over a one-size-fits all approach. This was primarily due to the challenges of applying new governance arrangements into existing situations; the fact that it presupposes a willingness on the part of owners to participate; and the challenges of establishing owner contact details and current title deed provisions. Respondents observed that the proposal would, more likely than not, be unpopular. Also that existing governance arrangements may be working well and that where this is so, overlaying a compulsory requirement would be problematic/unnecessary; some called for an option to opt-out. Examples of successful co-ownership schemes from abroad were cited; for example in Ontario.
- 4.2 Scope: Respondents sought clarity on how proposals would apply to mixed-tenure tenements and tenements with commercial as well as residential units. The suggested exemption for two flatted properties was generally supported; even for 3 or 4 flatted properties proposals were seen as disproportionate as arrangements set out in title deeds can suffice. Some saw potential in applying proposals to new development going forward and that this could help to demonstrate the benefits of a co-ordinated, long-term approach to property maintenance.
- 4.3 Governance: It was commented that a mandatory requirement to set up Owners Associations would be meaningless if these lack the teeth to effect any change. Reference to European examples noted the importance of mandatory decision-making procedures to enable such Associations to take action. Some sought clarity around the legal status of Owners Associations – it was seen as necessary for associations to be able to enter into contracts. It was also observed that establishing an Owners Association as a legal entity goes hand-in-hand with the management of sinking funds.
- 4.4 Applying the TMS: The idea of applying the Tenement Management Scheme (TMS) to existing tenements was received with misgivings. The key issue for any compulsory arrangement would be in determining the relationship with existing title deed provisions, where these exist. Overlaying potentially additional responsibilities on top of existing title deed requirements could represent a significant shift for owners. This is a complex area and amendment to UK legislation may be required. It was commented that *'as a default scheme, the current TMS helpfully plugs the gaps where the titles are silent'* and it may be appropriate to amend the TMS to *allow* the creation of Owners

Associations. For new developments a compulsory Development Management Scheme (DMS) was seen as more workable, assuming current flexibilities are retained.

- 4.5 Support: Owners Associations would need to be supported and, as for the introduction of Inspection Reports, this proposal brings with it a significant challenge in terms of administrative capacity and regulatory oversight. Barriers faced by associations include absent owners/lack of contact details; lack of knowledge of the law relating to property; lack of technical knowledge around building repair (particularly relating to traditional buildings); lack of knowledge around appointing building professionals and procuring building works; securing agreement around standards, quality of work and cost; meeting management and dealing with conflicting views; low turnout at meetings; volunteer burnout and detrimental impact on neighbour relations. It is worth drawing on the experience of the 'Traditional Building Healthcheck' scheme in Stirling, which reported *'less apathy around planned maintenance once tailored support is provided to help owners collaborate and co-ordinate works'*. The website 'Under One Roof' was identified as a useful source of information for owners. However, given the scale of the culture shift associated with the proposals it is likely that a more 'hands on' approach providing practical support would be needed.
- 4.6 Factoring – self, professional, independent: Respondents gave mixed views on whether 'lead owner' of a self-managed Owner Association should register as a Factor. Some commented that this would deter involvement and should be optional. Others noted that 'self-factoring' arrangements tend to be too informal and can lead to 'non-factoring' or 'crisis-factoring'. In support of professional factoring it was commented that this has proved a tried and tested model for managing the interests of multiple owners. The mobility of modern populations is resulting in less stability around property management, further justifying the need for professional factoring. It was observed that Glasgow City Council requires, as a condition of grant, a professional factoring arrangement to be in place. That said, negative experiences were also reported around professional factoring and a view put forward that an independent system (support provided via local authority or third sector organisation, targeting particular areas) would be preferable.
- 4.7 Relationship between Factor and Owners Association: The nature of the relationship between a Factor and an Owners Association with legal identity, needs further clarification. It was questioned whether an Owners Association is necessary in circumstances where factoring arrangements are already in place. Clarity was also sought on how a Factor would go about establishing an Owners Association.

5 SINKING FUNDS

- 5.1 General: While there was general support for the principle of creating Sinking Funds, the practical realities warrant far greater consideration. Key barriers include the practicalities around introducing a new compulsory requirement into existing arrangements; affordability; fairness (associated with introducing this requirement for one type of property); administration and cost (a heavyweight solution?) and apathy towards investing in property repair and ongoing maintenance. Some commented that private owners would struggle with the idea that financial contributions would not be 'paid back' when an owner sells up and moves on, but in effect 'belong' to the property. However, the fact that the Sinking Fund model exists and operates effectively in other countries suggests that the concept should be investigated further.
- 5.2 Affordability: There are significant concerns around affordability; typically those in the poorest standard of accommodation are least able to afford contributions and concern was expressed around security of tenure for those most vulnerable. Detailed consideration would need to be given to relate contributions to ability to pay – suggestions were made around means testing and incentivising contributions.
- 5.3 Fund size/point of sale issues: The challenge would be in the early years of the Fund, where insufficient funds would have been built up to undertake major repair works. It was commented that the overall cost of contributions may fall disproportionately on older people. Allowing owners to, in effect, defer payment until point of sale means that they will not benefit from repair work during their period of ownership and would act to delay works that would otherwise benefit the whole tenement community. There is also risk in instances where a defaulting owner doesn't sell, or has no/negative equity in the property.
- 5.4 Missing shares: Comments highlighted the need for much further discussion around how compulsory contributions would work in practice; who would be required to pay, and how debt would be recovered where shares are not paid in, whether non-payers would be in some way penalised. The role of local authorities in plugging missing shares was touched on though there was general recognition that resourcing, both in terms funds and administrative costs, inhibit even current use of missing shares powers.
- 5.5 Establishing rates: There was little support for a flat rate, although it was noted that a basic level could be set to cover the cost of Inspection Reports and basic annual checks (slipped slates and gutter cleaning). It was generally considered that the approach taken should vary according to the type and age of a property, since these factors determine maintenance and repair requirements. Some highlighted the role of the Inspection Report in informing the rate, with the surveyor making recommendations based on costs identified (there may be a skills gap to fill here). Other suggestions were that owners determine the rate and that property size may come into play. Fairness is an issue; those that have undertaken maintenance should not be penalised going forward. Control is another issue, there being potential for a majority owner gain greater

influence over fund contributions. Intervention by local authorities in determining rates was seen as complex/impractical. Title deed provisions for apportionment for mutual/common repairs may complicate the creation of Sinking Funds. The relationship with title deeds is also discussed above under Owners Associations – there is a particular challenge around incomplete or outdated deeds (an issue particularly affecting commercial premises which typically hold a disproportionate share within a block). Once again, a one-size-fits-all approach is unlikely to be appropriate.

- 5.6 Rationale behind Registered Social Landlord (RSL) exemption: Clarity was sought around the rationale for exempting RSLs from contributing to Sinking Funds in mixed tenure tenements. There were varying views on this issue; some commenting that they should, others that they shouldn't. It was recognised that RSLs would be unable to pass on higher overheads to tenants. Some disagreed with the proposal that RSLs be required to pay-up their share at point of sale. This area requires further clarification/discussion.
- 5.7 Disclosure of Sinking Fund arrears: This was recognised as a fundamental aspect in making the proposals operable, however there would also be issues are privacy and potential for negative market impact; the whole tenement becoming unattractive to a potential purchaser where Sinking Fund arrears are high.
- 5.8 The Fund: Safe Deposit Scotland and local credit unions were identified as potential Fund holders – bank accounts were deemed too difficult to set up and manage. There were some concerns expressed around fund oversight/regulation/financial controls. Differing views were expressed on the relative merits of investing the Fund. The purpose of the Fund would need to be clearly stated; it should be used exclusively to enable more extensive built fabric repair works along with maintenance works in common parts of the property. It should not be used for other costs such as mediation, arbitration services. The Fund would need to comply with anti-money laundering requirements and address issues relating to fraud, bribery and corruption. It was noted that fund security has been an issue that has blighted approaches to tenement maintenance in the past.
- 5.9 Incentives/funding: It would take time for Sinking Funds to grow to a sufficient level to fund the maintenance backlog. In the short-medium term, it is anticipated the other financial measures would be required to enable owners to undertake repairs identified through the Inspection Report, especially to ensure essential works on properties in very poor condition. Financial measures might range from fiscal incentives, through interest-free loans to non-repayable, means-tested grants. Suggestions/references included:
- A scheme modelled on the current Listed Places of Worship Scheme, whereby VAT on eligible repair work is claimed back.
 - A long-term revolving fund - a 'Scottish Tenements Repair Fund' or similar - akin to an Architectural Heritage Fund loan scheme.

- Need for ring-fencing of any public sector funds.
- Pilot equity release scheme (through the Energy Savings Trust) which is currently incentivising (albeit smaller scale) energy efficiency measures.
- Potential use of common buildings insurance to cover missing shares.
- Potential tenement surcharge on council tax bills as an alternative to Sinking Funds.

6 POSSIBLE NEXT STEPS

6.1 Respondents made a number of specific suggestions for *short-term practical steps* towards developing the proposals and addressing some of the barriers/concerns raised:

- Grant leverage – build on experience of requiring maintenance plans, common building insurance and professional factoring as condition of grant (Glasgow City Council).
- Data protection – build on work with Information Commissioner Office to share owner contact details with co-proprietors (Edinburgh City Council).
- Factoring - demonstrate where factoring can/does work and why this is so; draw on recent review of Property Factors Code of Conduct and consider improvement to existing mechanisms.
- Support to Owners – build on the experience of existing grant schemes – education, technical support and ‘hand-holding’ (Stirling City Heritage Trust, Glasgow City Heritage Trust, Inverclyde Council mediation service support).
- Conveyancing – explore with conveyancers their role in explaining and discussing with potential purchasers the costs associated with property management.
- Sector capacity to deliver Inspection Reports – potential for a conversion course for building professionals.

6.2 Respondents pointed to the need for *further research in the following areas to inform development of the proposals*:

- The human and financial costs of policy failure in this area/costs to society of poorly maintained tenements; to demonstrate the imperative need to find a workable solution.
- The roles of legal, financial, building professionals in making proposals work.
- The extent of real burdens in title deeds, which vary across the country; this would help indicate ‘what works’ in terms of existing arrangements, and human rights implications of overriding such burdens.
- Defining standards of good repair and mechanisms of enforcement/penalising non-compliance.

- The soaring cost of tenement repair and extent to which recalcitrant or non-responsive owners impose costs on co-owners.
- Market impact of disclosing data on Sinking Funds.
- Public safety – falling masonry incidents.
- Effectiveness of existing provisions such as Development Management Scheme.