POLICY NOTE

THE TENEMENTS (SCOTLAND) ACT 2004 (HEATING SERVICES) REGULATIONS 2018

SSI 2018/163

The above instrument is made in exercise of the powers conferred by section 19 of the Tenements (Scotland) Act 2004 ("the 2004 Act"). The instrument is subject to the negative procedure.

Background

The Tenements (Scotland) Act 2004 http://www.legislation.gov.uk/asp/2004/11/contents deals with the law on tenements with "tenement" defined in section 26. The term covers a wide range of property including traditional sandstone tenements, houses converted into flats, high rise blocks and "four-in-a-block".

The Scottish Government were approached by Aberdeen City Council for regulations to be made under section 19 of the 2004 Act to help them continue with their programme of installing district heating in tenement blocks. District heating is provided by the installation of pipes carrying hot water or steam in communal areas.

A similar request was made by Scottish Gas Networks for the installation of gas pipes in common parts of tenements. As the supply of gas through pipes is reserved, an Order under section 104 of the Scotland Act 1998 is proposed for laying in the UK Parliament by the UK Government, which lays down installation procedures similar to those in these Regulations.

Section 19 of the 2004 Act provides that owners of a flat are entitled to lead pipes, cables or other equipment through any part of the tenement (apart from parts wholly within another owner's flat) for the provision to that owner's flat of such services as the Scottish Ministers may prescribe by way of regulations

When making regulations prescribing services under section 19, the Scottish Ministers may lay down procedures for installing owners to follow when exercising rights under section 19. Such procedures can cover, for example, notifying other owners and taking account of any objections they may have. The Scottish Ministers may make provision for different procedures to be followed in relation to different services.

No regulations have been made to date under section 19.

Policy Objective

The Regulations under section 19 of the 2004 Act are to facilitate the installation, by owners, of communal heating and heating services supplied by a district heat network in tenements.

Currently if an owner wishes to install such a service, unless there is provision allowing for this in the title deeds of all relevant properties, they will need to obtain consent from all homeowners and try to resolve any objections through discussion. If agreement is not reached it may not be possible to install the service. These Regulations grant rights to lead

and fix pipes, cables and other equipment, subject to the procedure set out for exercising these installation rights. They give other owners a chance to object and contain provision for any unresolved disputes to be taken to the sheriff.

In preparing these Regulations, the Scottish Government has taken into account the following:

- In many cases, proposed installations are being carried out as part of work to alleviate fuel poverty and/or to provide more efficient heating services. This has beneficial effects for bill-payers and for the environment.

- Tackling fuel poverty feeds into the Scottish Government's national outcome to live in well-designed, sustainable places where we are able to access the amenities and services we need: http://www.gov.scot/About/Performance/scotPerforms/outcome

- The Regulations only apply when nothing is laid down in the title deeds enabling (or explicitly prohibiting) installation of pipes of this nature in common parts of tenements.

- The aim of these Regulations is to provide a relatively simple process for the installing owner to follow and to ensure that any owners who object are given a chance to outline their objections.

- The Regulations provide the option of a case being taken to court if agreement cannot be reached.

Homeowners with an existing title condition allowing pipes to be installed in common areas would continue to rely on the title condition rather than the default scheme in the Regulations. The Regulations define "title condition" by reference to section 122 of the Title Conditions (Scotland) Act 2003 http://www.legislation.gov.uk/asp/2003/9/section/122 and this definition includes both real burdens and servitudes. Our reasons for creating a default scheme which applies where title conditions do not already make provision are:

- There may be good reasons for the existence of the title condition in the deeds (e.g. the particular lay-out of the tenement).
- We do not wish to remove existing rights.
- This is generally in line with the 2004 Act. The Tenement Management Scheme provided for in schedule 1 of the 2004 Act is a default scheme.

The aim is to provide clarity for all parties concerned. The Regulations will apply where there is nothing laid down in title conditions which could provide for how pipes of this nature may be installed in the common parts of tenements.

There have already been some significant heat network developments in Scotland. The Scottish Government's draft Heat Generation Policy Statement of March 2014 http://www.gov.scot/Publications/2014/03/2778/7 proposes a target of 40,000 homes to be supplied with affordable low carbon heat through heat networks and communal heating by 2020. These regulations will provide some assistance to achieve the above mentioned target.

Consultation

Between 21 January and 14 April 2016, the Scottish Government carried out a formal consultation on the draft Tenements (Scotland) Act 2004 (Heating Services) Regulations: http://www.gov.scot/Publications/2016/01/3668/1

The responses on the consultation have been published. (https://consult.scotland.gov.uk/family-and-property-law/tenements-scotland-act-2004-regulations/consultation/published_select_respondent) Twelve responses were received, including from local authorities, consumer and advisory bodies The Energy Savings Trust and Citizen Advice Scotland and one academic.

There was overriding support and agreement that the Regulations should be made.

In light of comments raised by respondents on the use of an alternative dispute resolution (ADR) process to try to reach agreement where an owner objects, provision related to ADR was not included in the Regulations. Including provision for ADR was suggested during Business and Regulatory Impact Assessment interviews where it was suggested there should be a further step to resolve any issues prior to going to court. Although respondents were supportive of the use of ADR, there were concerns on the lack of clarity on what the process would involve and on the cost of using ADR. The Scottish Government concluded it would be unhelpful to lay down detail in the Regulations on what ADR consists of, as there can be many different types of ADR. However, the requirement for the installing owner to try and reach agreement with any objecting owner remains. This could include an ADR process.

We have taken on points raised by Aberdeen City Council. This has resulted in more information being provided in the installation notice issued to the homeowners in the tenement about the work. The notice includes information about the on-going maintenance and repair of the equipment once it is installed. Concerns were also raised about what would happen if the contractor carrying out the installation should cease trading. Installing owners must outline the arrangements that will be put into place to ensure the work is completed.

Impact Assessment

No Child Rights and Wellbeing Impact Assessment (CRWIA) or Data Protection Impact Assessment (DPIA) have been prepared as the Regulations have no specific impact in these areas.

On a Strategic Environmental Assessment (SEA), a Draft Heat Generation Policy Statement Strategic Environmental Assessment – Environmental Report has been prepared generally (not specifically for these regulations): http://www.gov.scot/Publications/2014/03/7673/downloads#res445636

An Equality Impact Assessment (EQIA) was undertaken. During the framing exercise we considered whether homeowners who are given notice of the proposed installation might be unable to read the notice due to a disability or because a lack of knowledge of the English language. This point was raised during the BRIA interviewees, although it was not an issue that they had come across. We concluded that it would not be proportionate to make specific provision in the Regulations to address this point, as the degree of impact on the protected

characteristics was limited. However, the Scottish Government would expect installing owners, who will generally be working with larger organisations, to work with neighbours who may have difficulty in reading English.

The Regulations are to facilitate the installation, by owners, of communal heating and heating services supplied by a district heat network in tenements. This will facilitate work by utility companies and/or social landlords to provide access to more economical fuel services which can help alleviate fuel poverty. Reference to this was made in both consultation on the draft Regulations and the Business and Regulatory Impact Assessment.

Financial effects

A Business and Regulatory Impact Assessment (BRIA) has been completed. During the BRIA process none of the interviewees could quantify in cash terms the financial benefit of the Regulations. It was noted that the Regulations provide a simple process to follow and, therefore, could save the installing owner time and money. In addition, having a clear process to follow may prevent installation projects overrunning. This may have some financial benefit to the overall budget assigned to such projects.

Fees will be incurred if the installing owner decides to make an application to the sheriff to gain permission to proceed with an installation after failing to reach an agreement with objecting owners. The court fee will be consistent with those charged for similar type of summary applications to the Sheriff Court. In addition, there may be costs incurred in relation to obtaining legal representation. However, interviewees suggested that court action in this area would be infrequent.

Civil Law and Legal System Division
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