



ENGLISH HERITAGE

English Heritage Response to Consultations on:

- 1. Non-economic Regulators: Duty to Have Regard to Growth**
- 2. Amending the Regulators' Compliance Code**

Introduction

1. This is a combined response to the above two consultations dated March 2013 and issued by the Department for Business Innovation and Skills. English Heritage is defined by the Department as a Non-Economic Regulator for some limited purposes.
2. English Heritage is an Executive Non-Departmental Public Body sponsored by the Department for Culture, Media and Sport. We work in partnership with central government departments, local authorities, voluntary bodies and the private sector to conserve and enhance the historic environment, broaden public access to our cultural heritage, and increase people's understanding and appreciation of the past.
3. We are the Government's adviser and a statutory consultee on all aspects of the historic environment and its heritage assets. This includes archaeology on land and under water, historic buildings and areas, designated landscapes and the historic elements of the wider landscape.

Summary

4. Economic vitality is key to heritage conservation and heritage makes an important contribution to it. The National Planning Policy Framework (the NPPF) resolves how heritage conservation should be achieved within a vibrant economy. The NPPF governs much of the areas of business within which English Heritage operates.
5. English Heritage is already subject to a duty to promote sustainable development, as defined in the NPPF, and is therefore already subject to a duty to be mindful of the opportunities for growth. English Heritage consults with business very regularly to understand how to optimise the relationship between economic vitality and conservation.

6. English Heritage's powers as a regulator are very limited. The use of these powers is very infrequent (one case in the past twelve months). The impact of those regulatory activities is negligible.
7. English Heritage is unclear as to what the duty to have regard to growth would apply to. Particularly, it is not clear if the duty would apply to: direct regulatory activity alone; policies and principles that English Heritage sets out that others are expected to follow; or, all of English Heritage's activities, including all its casework.
8. If the duty was to apply to policies and principles or all of its activities, that would clearly impact upon and conflict with the planning framework within which English Heritage works as the NPPF provides a different formula for the consideration of economic growth and conservation.
9. Given the current duties upon it and the policy context for its work, English Heritage does not foresee that being subject to a statutory growth duty would alter economic or conservation outcomes.
10. English Heritage believes such a duty has the potential to cause significant confusion and disruption to normal activities through additional complaints and legal challenges by those who misunderstand or wilfully misinterpret the duty. If proceeded with, the duty must be drafted so that it is clear that:
 - it is limited in its application to defined areas of English Heritage business that are regulatory;
 - it applies to the formulation of general policies or principles and not individual casework; and,
 - that the duty would not operate so as to oblige English Heritage to do something that is less in the interests of heritage conservation than something it might otherwise have done.

Heritage and Growth

11. Conservation of all heritage assets relies, albeit to differing degrees, on ongoing maintenance and therefore ongoing investment. Economic vitality is therefore key to the overall success of conservation in England.
12. Our heritage is a major contributor to economic vitality. It provides income to the country through tourism and is frequently the seed-corn of successful, characterful and sustainable regeneration of run-down areas.
13. The vast majority of heritage assets are in private hands. The conservation of such assets depends on the motivation of the owners, which in large part will be dictated by their own economics. It is

‘Sustainable Development’, Conservation and Growth

14. The National Planning Policy Framework (the NPPF) provides a definition of ‘sustainable development’ and policies for planning decisions that encapsulates the tie-in between economic vitality and heritage conservation. It thoughtfully sets out the way in which those twin objectives should be sought in way that maximises the potential for both, whilst minimising conflict.
15. The NPPF effectively governs a great deal of the work that English Heritage is involved in. Where it does not directly apply as a matter of law, English Heritage still sees its principles as applying as a matter of consistent common sense.
16. Applying the principles of the NPPF to the work of conservation requires all decision-makers involved in the planning system to be mindful of the objective of heritage regulation and of growth.

English Heritage’s Engagement with Business

17. It has always been vital to the success of English Heritage’s work that it understands the position and motivations of owners and that through that it understands the impact of its activities.
18. English Heritage has very good ongoing relations with representatives of owners and developers across the spectrum of relevant property concerns. Bodies such as the Country Land and Business Association, the British Property Federation and the Historic Houses Association are in very regular contact informally and formally through the Historic Environment Forum. The Chair of English Heritage has frequent meetings with these bodies to ensure that the corporate strategy takes in their concerns.
19. They are consulted on all matters of concern to them. They are active participants in the drafting of guidance to support the NPPF, which is being organised by the Historic Environment Forum as a consensus guide to achieving conservation objectives with a mind to other planning concerns, including growth. Business is also represented on the National Heritage Protection Plan (NHPP) Advisory Board. The NHPP is a means by which English Heritage prioritises its areas of work.

20. Owners and developers are represented on English Heritage's governing body (the Commission) and its statutory advisory committees.
21. English Heritage also has its own experience to draw on as the operator of a heritage attraction business covering over 400 properties with a turnover in excess of £50m.

English Heritage as a Regulator

22. English Heritage's role in the protection of the historic environment is frequently misunderstood. English Heritage is principally an expert adviser. It is not a decision-maker in the planning system. Its regulatory activities are very limited:
 - English Heritage has a power to prosecute offences under the Ancient Monuments and Archaeological Areas Act 1979 and the Planning (Listed Buildings and Conservation Areas) Act 1990. In the past 12 months (not an untypical year) one prosecution under the 1979 Act and none under the 1990 Act was undertaken.
 - English Heritage may apply for an injunction to prevent any such breaches of the law. None was applied for in the last year.
 - In Greater London only, English Heritage has the power to direct local planning authorities to refuse listed building consent. It also has certain powers to execute works and compulsorily acquire listed buildings at risk in Greater London. None of these powers was used in the last year.
 - English Heritage has some limited powers of entry onto land for the purposes of compiling records. None was used in the last year.
23. English Heritage is very active in providing advice and guidance to local planning authorities as to the best means of achieving the objectives of the NPPF at the strategic level of making local development plans and on a case-by-case basis. Local planning authorities are bound to take into account such advice in so far as it is in keeping with the NPPF and their existing local development plans.
24. As the NPPF and local plans are all directed to the objective of sustainable development, which already has the objectives of growth and heritage conservation (amongst others) written into it, then English Heritage's advice will only be in keeping with the NPPF and therefore a relevant consideration for the local planning authority if it is mindful of both the conservation and growth impacts of its position on any given issue.
25. English Heritage is not responsible for any system of compliance. The impact of its regulatory activities is very limited indeed and in the last year has been negligible.

The Principle of a Growth Duty

26. Through its management agreement with its sponsor department, the Department of Culture Media and Sport, English Heritage is already subject to a duty to promote sustainable development generally through all its advice and activities.
27. This is something English Heritage wholeheartedly supports given the balanced definition of sustainable development within the NPPF that takes account of the objectives of conservation and growth.
28. Given the very limited scope of English Heritage's regulatory activities and the way in which mindfulness of growth is already written into the objectives and activities of English Heritage and of the planning system, we do not foresee that a new statutory growth duty for English Heritage would have any positive impact for growth or heritage conservation.
29. We believe that a growth duty has the potential to cause significant confusion and disruption through informal and formal legal challenge to English Heritage's activities by those who misunderstand or who wilfully misinterpret that the growth duty is intended to compliment and not compete with the primary statutory purposes of the organisation.
30. We currently publish around 15 pieces of general advice and guidance annually and are asked to respond to around 22,000 cases from around the country. From this arises an average of around 50 complaints yearly, of which an average of around 5 turn into a threat of judicial review or JR proceedings.
31. It is difficult to estimate what impact the growth duty would have on this activity. The less it is clear how the duty will operate the worse the impact will be. Given that a large part of the casework we deal with relates to businesses and that any complainant is going to feel that the duty offers them an additional opportunity to challenge our advice, whether their complaint relates to growth matters or not, then we can expect a fair proportion of the annual complaints activity to harden into threats of JR or JR proceedings.
32. It is also very possible that quite a few of those complaints will come from those opposed to development who might suggest we have misapplied the growth duty in giving our advice. Those sorts of judicial review proceedings have an impact not just on English Heritage but also on the planning process and hence on development. Indeed, very often the motivation for the complaint or judicial review is as a simple tactic to slow down or try and change a planning process. In recent months English Heritage has contended with two significant judicial review proceedings aimed at delaying or deterring a major infrastructure scheme at London Bridge Station and a major housing scheme in York.

33. If a growth duty is to be imposed, then in order to avoid regular and resource sapping debates and legal proceedings about the prime concern of English Heritage and how the potentially conflicting duties ought to be applied to any given circumstances, the duty must be drafted so that it is clear that:

- it is limited in its application to defined areas of English Heritage business that are regulatory (as set out above);
- it applies to the formulation of general policies or principles and not individual casework;
- that the duty would not operate so as to oblige English Heritage to do something that is less in the interests of heritage conservation than something it might otherwise have done.

34. So in the limited circumstances in which it is to apply, the duty should only affect a decision where there is more than one way to proceed and each way is equally satisfactory from the point of view of heritage conservation. In those circumstances, which are not common in our view, there is clearly scope for considering which is the most efficient for business and would most likely promote growth.

35. We consider the impact of all our activities in this way already. Our regular dialogue and formal consultations with business ensures those considerations are well-informed.

Requirements on Regulators under the Proposed New Code

36. English Heritage is already subject to the existing Regulator's Compliance Code, but only in so far as English Heritage has a regulatory function (see Legislative and Regulatory Reform (Regulatory Functions) Order 2007, article 2 and Schedule 1). As set out above, English Heritage's regulatory functions are very limited in scope and their use is infrequent and negligible in relative scale.

37. The objectives of the draft code of efficiency and understanding of the impacts of activities on others is something that English Heritage builds into all its activities.

38. The concerns we have with the code relate to the resource implications. If English Heritage were to comply with the strict requirements of the draft Code then a number of administrative tasks not currently carried out would have to be put in place for little or no obvious benefit given the scope of regulatory activities within English Heritage. Examples include:

- Training in the Code;
- Published standards, including a compliance and enforcement policy;

- New appeals procedures (see paragraphs 2.5 and 2.6 of the draft Code);
- Customer satisfaction surveys (paragraph 2.8);
- Publication of inspections processes (paragraph 3.8);

39. English Heritage recognises that these are all features that would be sensible and appropriate if part of the business was regularly conducting regulatory activity within the meaning given in the Legislative and Regulatory Reform Act, but it is not.

40. We appreciate that the statutory duty in s22 of the Act is not to slavishly follow the Code, but to have regard to it. Nonetheless, we believe the Code ought to expressly acknowledge the need for proportionality in the systems set up to achieve the Code's objectives.

41. If English Heritage adhered to the letter of the Code's requirements it would spend very considerably more resources on demonstrating compliance than it would on regulatory activity. That would obviously be to the detriment of our other activities in support of sustainable development.

In answer to the specific consultation questions on the Growth Duty

Question 1: Should primary legislation be used to introduce a duty for regulators to have regard to growth and the economic impact of their actions?

We believe that the duty to promote sustainable development to which English Heritage is already subject successfully delivers the objective. See above for more detailed comment.

Question 2: Is there an alternative means by which these objectives, described in paragraphs 2.1 to 2.6 above, could be achieved?

Yes – the non-statutory obligation to promote sustainable development as defined in the NPPF to which English Heritage is already subject through its funding agreement. See above for more detailed comment.

Question 3: Do you agree that the duty should be complementary to existing duties?

It depends what is meant by 'complementary'. The duty should only affect a decision where there is more than one way to proceed and each way is equally satisfactory from the point of view of heritage conservation (English Heritage's primary objective). See above for more detailed comment.

Question 4: Should the duty be principles-based, for regulators themselves to interpret and apply to their operations, or should it also specify the manner in which economic growth should be supported?

If a growth duty is to be imposed, then in order to avoid regular and resource sapping debates and legal proceedings about the prime concern of English Heritage and how the potentially conflicting duties ought to be applied to any given circumstances, the duty must be drafted so that it is clear that:

- it is limited in its application to defined areas of English Heritage business that are regulatory (as set out above);
- it applies to the formulation of general policies or principles and not individual casework;
- that the duty would not operate so as to oblige English Heritage to do something that is less in the interests of heritage conservation than something it might otherwise have done.

See above for more detailed comment.

Question 5: Do you think that guidance in how to implement the proposed growth duty would be useful? If yes, please provide examples of what it should cover.

It is obviously preferable that the duty itself needs little further explanation in order for its scope and application to be readily understood. Notwithstanding, guidance might usefully explain:

- to what activities the duty applies in practice for organisations like English Heritage that give advice in the planning system on a generic and case-by-case basis.
- how the duty might be discharged, being careful to state what is not expected as well as what is.

Question 6: Do you agree that the measurement and monitoring mechanisms proposed above, allied to those of the revised Regulators' Compliance Code, would be adequate for this purpose? If not, please provide details.

No. They will not achieve the objectives we have set out above. In any event, the Regulators' Code is under a separate regime, the scope of which is already drawn. It is clearly preferable to have only one guidance document, but the way in which the growth duty would apply and be discharged by bodies such as English Heritage needs direct and careful explanation.

Question 7: Do you agree that the duty should in principle apply to all noneconomic regulators?

We believe that the duty to promote sustainable development is the appropriate duty for those involved in the planning system, and possibly others as well, for the reasons given above.

Question 8: Should the Pensions Regulator be included in the scope of the growth duty?

We are obviously not in a position to answer this.

Question 9: Do you feel that a growth duty would reduce costs to business and remove or address barriers to growth?

Being mindful of the economic needs of business and of the country as a whole is already written into the objectives of the organisation, the activities we carry out, the planning framework within which we work and the duty to promote sustainable development to which we are subject through our funding agreement. So we do not anticipate any further benefits to business from the imposition of the duty, laudable though its objectives so clearly are.

Please see our more detailed comments above.

Question 10: How would you envisage a regulator's actions changing as a result of a growth duty? Please consider this in light of evidence presented above, and/or with reference to other situations where regulator actions impacted a company or industry's ability to grow. Where possible, provide a monetary indication of likely impact of a successfully operating growth duty on a company or industry

We do not anticipate there would be any change in our objectives or positive activities given the degree to which the impact on businesses is already taken into account (again, see our comments above). We anticipate English Heritage would be subject to further tactical complaints and judicial reviews.

Question 11: Is there any evidence that this will add significant burdens to regulators and why?

We anticipate the duty could be used to challenge the advice of English Heritage in its generic guidance and in its casework advice so as to undermine its credibility and tactically in order to delay planning matters. See above for more detailed comments on impact.

In answer to the specific consultation questions on the Regulator's Compliance Code

Question 1: Do you agree that the Regulators' Compliance Code and the voluntary Enforcement Concordat should be replaced with a new code?

English Heritage sees no objection to this.

Question 2: Do you agree with the name of Regulators' Code? If not, please suggest alternative titles for the Code.

Yes.

Question 3: Are the draft requirements of the Regulators' Code appropriate? Please provide any supporting evidence in your response.

See comments above. Some of the requirements appear mandatory when they are not when viewed in light of the statutory framework. Some of the mandatory requirements are not appropriate or would be disproportionate for some regulatory activities. We would wish to see words such as “where appropriate and proportionate to the regulatory function” introduced to prevent unnecessary bureaucracy and cost.

Question 4: Are there additional requirements you consider important that are not captured by the draft code? Please state these and your reasons.

No.

Question 5: Do you agree with the principles based approach of the code, together with the requirement for each regulator to publish detailed, specific service standards?

Yes, subject to the requirement on each regulator being reflective of the need for relevance and proportionality.

Question 6: What should be included in regulators’ service standards to meet the requirements of the code and ensure that these standards enable businesses and other regulated bodies to hold regulators to account?

This would not be applicable to English Heritage given the very narrow scope of the organisation’s regulatory activities under the Legislative and Regulatory Reform Act’s ambit.

Question 7: How should regulators’ compliance with the requirements of the code and their published service standards be monitored?

We would ask that the very narrow scope and the particular nature of English Heritage’s regulatory activities be taken into account in the manner and regularity of any monitoring scheme. We would also ask that other monitoring of regulator activities of English Heritage conducted by the Department be coordinated into one exercise.

Question 8: How can the code be made more accessible to business and regulated bodies and how can they be encouraged to engage with regulators in developing policy and challenging poor practice?

Please see commentary above as to the vital link between heritage conservation and economic vitality and how English Heritage works with business to achieve both. There are well-established links with business and

Question 9: How should the scope of the Regulators’ Code be defined?

The scope should be defined by the regulatory activities that the Legislative and Regulatory Reform Act covers. To extend it to other activities would be to overreach the legislative framework from which it gets its status and would confuse the reader as to its authority and purpose.

Question 10: Should the scope of the Regulators' Code be amended? Please provide reasons and any supporting evidence for your answer.

No. Please see comments immediately above and in the general commentary.

Question 11: Do you agree with this approach to providing guidance on the code?

Yes, provided it is brief and follows the principles of the Taylor review on planning guidance.

ENGLISH HERITAGE
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