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LINKING LAND & PROPERTY INFORMATION

*Unauthorised alterations to domestic properties*  
A Unifi Scotland White Paper



**Table of contents**

- 1. Unifi Scotland ..... 3**
- 2. Scope of this paper ..... 3**
- 3. Background ..... 4**
- 4. General context ..... 5**
- 5. Planning approvals ..... 6**
  - Planning Permission ..... 6
  - Listed Building Consent ..... 7
- 6. Building approvals ..... 8**
- 7. Addressing existing problems ..... 9**
- 8. Confirmation of existing problems ..... 9**
- 9. Information as the cornerstone ..... 10**
- 10. Evolution of property information sources ..... 10**
  - Information about Planning matters ..... 11
  - Information about Listed Buildings ..... 11
  - Information about Building Control matters ..... 12
- 11. Conclusions ..... 12**
- 12. Recommendations ..... 12**
- Appendix A - Overview of the Building (Scotland) Acts ..... 13**

# ‘Unauthorised alterations to domestic properties’

## A Unifi Scotland White Paper

### 1. Unifi Scotland<sup>1</sup>

1.1 Unifi Scotland (‘Unifi’) is an independent Scottish-based think tank which aims to encourage and stimulate debate in the field of land and property in Scotland. Its goal is to promote a co-ordinated response and identify ‘fit for purpose’ solutions to the challenges and opportunities ahead.

2.2 The current membership of Unifi is broadly based with members having significant experience in the communications, finance, legal and surveying sectors of the land and property market. More particulars of Unifi’s membership are included in Appendix A. See also [www.unifiscotland.com](http://www.unifiscotland.com)

### 2. Scope of this paper

2.1 This is the first paper prepared by Unifi since its establishment in 2006.

2.2 This paper does not consider to any significant extent the ambitions of the Shared Services agenda and Efficient Government efforts presently being advanced by the Scottish Executive and ambitions for Transformational Government at a UK level where the laudable ambition is to develop theme based and life event services by citizen and business centric information hubs. In addition, Unifi is convinced that the various initiatives such as e-Planning and other investments already made in making publicly-held property information more readily accessible (for instance, the creation of a Definitive National Addressing resource for Scotland) may mitigate previously identified difficulties encountered in growing a Scottish Land Information Service. However these matters have influenced the content of this paper.

2.3 This paper is primarily concerned with property information and considers the significant issue of ‘unauthorised alterations’ (both extensions to and internal alteration of) properties, where for example:

- alterations have been carried out to a property without any, or some, of the required regulatory approvals; or
- the appropriate regulatory approvals for alterations cannot be located (for instance, they have not been kept with title deeds for the property)

This can result in an unacceptable impact on the conclusion of property transactions and, in turn, undermine the aim of delivering property services that are fit for purpose in a modern environment.

2.4 The issue of unauthorised alterations involves, in day-to-day practice:

- planning approvals (ie planning permission and, where relevant, listed building consent); and
- building approvals (namely building warrants and completion certificates)

2.5 It has been estimated that issues about unauthorised alterations arise in about one in three conveyancing transactions. Clearly this is a significant issue which has to be considered and addressed.<sup>2</sup>

2.6 The lack of relevant information about unauthorised alterations may delay settlement of the sale of a property. It may, in the worst cases, mean there is no settlement of the sale, which may have a knock-on effect on other purchases and sales in a chain.

2.7 Abortive or delayed transactions not only have financial costs (for instance, in terms of delayed settlements) but administrative costs (such as arranging bridging loans or reorganising or cancelling removals) and

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<sup>1</sup> See <http://www.unifiscotland.com>

<sup>2</sup> It is understood that the Law Society of Scotland has initiated, or is about to initiate a survey of its members and this survey will provide information about ‘unauthorised alterations’.

also human costs (in terms, for instance, of stress or disappointed children who will not be starting term at a new school).

2.8 Unifi believes that any proposal which addresses these consequences of unauthorised alterations are in the public interest and demand serious consideration.

2.9 This paper concludes with recommendations which if acted upon will be of benefit to those involved in the land and property market in Scotland.

### 3. Background

3.1 There have been significant changes in the land and property market in Scotland, including the reform of land tenure and modernising relevant regulatory regimes, for instance the Building (Scotland) Act 2003.

3.2 More changes are on the immediate horizon, including the implementation of provisions introducing 'Single Surveys'<sup>3</sup> and the modernised planning regime outlined in the Planning etc. (Scotland) Act 2006 which will be brought fully into force around April 2008. There is also the possible extension of 'permitted development rights' under our planning legislation. This would mean that certain types of development, in particular development within the curtilage of a dwelling house, would no longer require planning permission.<sup>4</sup>

3.3 Change is being driven by the needs, demands and aspirations of all those (owners, developers, government (central and local) and other regulatory bodies, purchasers, financial institutions and professional advisers) who are engaged in the land and property market in Scotland. This evolution encompasses the aim of continuous improvement in the delivery of both public and private services.<sup>5</sup>

3.4 Regulatory change and new information technology infrastructure and services are combining to facilitate, and maximise the potential for, speedier, more certain and more cost effective outcomes in the land and property market in Scotland.

3.5 For instance, it has been estimated that savings from government investment in e-planning after 10 years are £44m.<sup>6</sup>

3.6 Unifi believes that information and its management lie at the heart of all phases in the land and property system.

3.7 If all relevant information is accurate and comprehensive, can be properly interpreted and can be relied upon and is readily accessible, then this would represent a major step change towards an efficient (including fully integrated) Scottish land and property market system which would offer best value for all stakeholders in that system.

3.8 One of the core objectives of the Scottish Executive's Housing Improvement Task Force was to ensure that prospective purchasers of residential property obtained better information at an earlier stage of the purchase process.<sup>7</sup> The Scottish Executive established and charged the Purchasers' Information Advisory Group ('PIAG') to deliver that objective. PIAG has agreed that more relevant property information should be available to prospective purchasers subject to striking an appropriate balance between supplying property information and the cost of supplying that information.

3.9 PIAG has proposed that a Property Sale Questionnaire ('PSQ') should be completed by all sellers prior to a property being marketed for sale<sup>8</sup> the aim being to make better property information available as soon as

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<sup>3</sup> See Housing Scotland) Act 2006 (asp 1) and also paragraph 3.8 above.

<sup>4</sup> See paragraph 5.5 below.

<sup>5</sup> See, for instance, the Scottish Executive's November 2004 Planning Advice Note 70: Electronic Planning Service Delivery at paragraph 2 and paragraph 2.2 above.

<sup>6</sup> Train B *E-Planning Efficient Government Programme* (2006) 113 Scottish Planner 6 and section entitled 'E-Planning Efficient Government Programme' in January 2007 Scottish Executive Planning Bulletin Issue No. 25

(<http://www.scotland.gov.uk/Publications/2007/01/31112510/0> .

<sup>7</sup> See <http://www.scotland.gov.uk/hitf>

<sup>8</sup> See Brymer S, *Property Sale Questionnaire: Threat or Opportunity?* 2007 *Property Law Bulletin* 85.

possible to prospective purchasers, their solicitors and also the surveyor who will be instructed by the seller to carry out the Single Survey for the property for sale.

3.10 Unifi supports the PSQ proposal. However, it also emphasises that the lack of readily-accessible property information is one of the main impediments to improving the Scottish land and property system. This results in delays to properties being marketed for sale, and a variety of the relevant information provided is subject to exclusions of liability for damages arising from the use of information provided. Those exclusions are designed to protect those offering the information.<sup>9</sup>

3.11 Unifi believes that government should be looking to further progress the availability and quality of property information with the ultimate aim of delivering a property information system that allows the public, including professionals, to:

- access an appropriate webpage and simply key in a property address to retrieve relevant property information such as:
- ownership information;
- council tax and non-domestic rates information;
- planning information including the relevant development planning provisions that affect the property, extant planning permissions for the property and whether there are any planning enforcement notices that affect the property;
- building control information such as building warrants and completion certifications; and
- other regulatory approvals such as whether the property is licensed and/or registered as a house in multiple occupation and whether it is licensed under the liquor licensing regime;
- that information should be both accurate and be able to be acted upon (including without any exclusion, or limitation, of indemnity by the information provider).

## 4. General context

4.1 In general, individuals and institutions are increasingly expecting that services in the land and property market in Scotland will be provided more quickly and at a cost that represents a very small, and diminishing, fraction of the value of the land or property for sale.

4.2 The cost of a property transaction is one important feature for consumers. At one end of the spectrum lie the significant costs of Stamp Duty Land Tax and estate agent fees, moving towards relevant profession (solicitor and surveyor) fees and at the other end of the spectrum local authority fees such as charges for 'Letters of Comfort', which range from £150 to £300.<sup>10</sup>

4.3 However, increasingly, the most significant factor in the land and property market is the speed at which a property transaction can be concluded. Unifi considers that accessing reliable information on 'unauthorised alterations'<sup>11</sup> is a key factor in facilitating an improvement in the speedier conclusion of property transactions.

4.4 Individuals in particular are increasingly more knowledgeable about property matters, more aware and more predisposed to seeking recourse when they consider that inadequate services have been provided by their advisers or government officials. There is a whole spectrum of dispute resolution processes (such as ombudsmen, complaints to professional bodies, alternative dispute resolution and ultimately the courts) available to those who feel aggrieved.<sup>12</sup>

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<sup>9</sup> See, for instance, the recently provided SEPA Flood Map (referred to at paragraph 10.2 below) which is provided with the caveat that:

*The map is not intended to provide a definitive assessment of flood risk to individual properties and it does not replace the need for detailed investigations at a local scale. The information is provided for personal use by the public and not as a commercial tool.*

<sup>10</sup> See section 7 below.

<sup>11</sup> As defined in paragraph 2.2 above.

<sup>12</sup> See, for instance, paragraph 5.14 below.

4.5 Advisers are apparently becoming more risk adverse and are seeking to minimise the risk that one error might mean the end of a business or the sale of their assets to satisfy an award of damages. For instance, although property enquiry certificates are obtained as part of the conveyancing process it appears routine for the sellers and their advisers to pass the risk to the purchasers and their advisers by requiring that the purchasers have to satisfy themselves on matters including the position on regulatory (including planning and building) approvals.

4.6 In Scotland there is no comprehensive legal code which regulates the land and property market. Reference has to be made to a host of regulatory (common law and statutory) regimes.

4.7 To satisfy the demands of more sophisticated consumers, advisers are expected to be able to offer advice on property related matters such as taxation (such as inheritance tax and tax implications of buy-to-let schemes, including capital gains tax) as well as more traditional property advice.

4.8 To meet the demand for more traditional property advice requirements (of owners, sellers, prospective purchasers and those financing them) professional advisers will have to be able to take into consideration and report on matters such as title provisions (including features such as 'common good land' and the Crichton Down rules<sup>13</sup>) and the provisions of a host of regulatory regimes including the Town and Country Planning (Scotland) Act 1997 ('the 1997 Act'), the Planning (Listed Buildings and Conservation Areas) Act 1997, the Building (Scotland) Act 2003, the Environmental Protection Act 1990, the Roads (Scotland) Act 1984 and the Water Environment and Water Services (Scotland) Act 2003 (including the amendments introduced by that Act to the Sewerage (Scotland) Act 1968 and the Water (Scotland) Act 1980) and provisions within the realms of subsidiary legislation made under such primary legislation.

4.9 In addition, financial institutions are taking more notice of issues such as flood risks and corporate social responsibility, whilst a number of financial institutions have adopted the Equator Principles, a set of internationally recognised, voluntary project finance guidelines which establish social and environmental standards in the finance industry.<sup>14</sup>

4.10 While the Equator Principles apply to major development projects there are signs that the sort of audits and considerations taken into account in those projects will, in the not too distant future, be taken into account in smaller projects including the provision and transfer of residential properties.

4.11 A number of the above matters are beyond the scope of this paper. However, it does underline that what may appear to be a straightforward matter, for instance the sale or purchase of land, a mixed use development or a house, is often anything but straightforward.

## 5. Planning approvals

5.1 Planning approvals mainly comprise Planning Permission and Listed Building Consent. These approvals are considered in the following paragraphs.

5.2 The importance of access to planning approval materials has recently been underlined by the recent announcement of the Scottish Executive's planned additional £12m investment in e-Planning.<sup>15</sup>

### Planning Permission

5.3 Planning Permission is required for alterations to buildings unless the works:

- are for the maintenance, improvement or other alteration of any building being works which affect only the interior of a building, or do not materially affect the external appearance of the building;<sup>16</sup> or

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<sup>13</sup> Scottish Office Development Department Circular 38/1992: *Disposal of Surplus Government land: The Crichton Down Rules* and see, for instance the decision dated 6 December 2006 in *John Findlay in Petition for Judicial Review*. [2006] CSOH 188 and 13 December 1995 decision in *JDP Investments Ltd v Strathclyde Regional Council* (1996) 54 SPEL 32.

<sup>14</sup> See, for instance, Watchman J, *Corporate Social Responsibility, the Equator Principles and Sustainable Development: An Introduction* (2006) 117 *Scottish Planning & Environmental Law* 111.

<sup>15</sup> See paragraph 10.4 below.

- are 'permitted development' and are not the subject of an 'Article 4' direction (a direction which restricts permitted development rights).<sup>17</sup>

5.4 No enforcement action can be taken under the planning legislation where there has been a breach of planning control consisting in the:

- carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land<sup>18</sup> after the end of the period of four years beginning with the date on which the operations were substantially completed;<sup>19</sup> or
- change of use of any building to use as a single dwellinghouse after the end of a period of four years beginning with the date of the breach.<sup>20</sup>

5.5 However, the regime does not remain static, for instance the Scottish Executive in its 2005 White Paper 'Modernising the Planning System' indicated proposals to expand permitted development rights.<sup>21</sup> This has been progressed. However, amendments to the General Permitted Development Order have still to be made.<sup>22</sup>

5.6 Moreover, uncertainties arise in individual cases arise. For example, in *First Secretary of State v Arun District Council and Another*<sup>23</sup> the English Court of Appeal held that enforcement action could only be taken within four years of the breach of a condition imposed upon on the grant of a planning permission – deciding that the breach amounted to a change of use, and not a breach of planning condition. The local planning authority had granted planning permission for an extension to a house on condition that the extension could only be occupied by a dependent relative and thereafter as part of the house as a single dwelling. The extension was subsequently let as separate living accommodation. It was held that enforcement action would have to take place within four years of the breach of planning permission because it was a change of use - and not within the ten year period for a breach of a planning condition as the lower court had held.<sup>24</sup>

5.7 In practice, the absence of Planning Permission for alterations carried out more than four years ago is very rarely an issue in property transactions.

5.8 However when issues about Planning Permission arise (for instance, details of planning permission not according with subsequent Building Warrants), these have to be able to be resolved: for instance by an application for retrospective Planning Permission<sup>25</sup>, an application for a material variation of a Planning Permission<sup>26</sup> or an application for a non-material variation of a Planning Permission.<sup>27</sup>

### Listed Building Consent

5.9 In practice, the main issue regarding planning approvals is the absence of Listed Building Consent in property transactions. Such consent is required for proposals that will affect the character of a listed building. This applies regardless of the category of listing (A, B or C(S)) and to work affecting the interior or exterior of a listed building. Demolition of a listed building and apparently minor operations, such as stone cleaning, alterations to or replacement of windows or installation of roof lights may require Listed Building Consent.<sup>28</sup>

<sup>16</sup> S 26(2)(a) of the 1997 Act.

<sup>17</sup> See the Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1192/223), Part 2 and Schedule 1 and paragraph 5.5 below.

<sup>18</sup> 'Land' is defined under s 277(1) of the 1997 Act as including any 'building' as defined in that section.

<sup>19</sup> S 124 (1) of the 1997 Act.

<sup>20</sup> S 124(2) of the 1997 Act.

<sup>21</sup> See July 2005 Scottish Executive White Paper *Modernising the Planning System* at 5.1.5 and first bullet point under sub-heading 'Local Authorities' in section 7.

<sup>22</sup> See <http://www.scotland.gov.uk/Publications/2006/10/09103423/> for 'Review of the General Permitted Development Order 1992: Householder Report' (December 2006) which recommends reducing the number of householder developments that require planning permission. It has been estimated that the recommendations if implemented would lead to a reduction of 38% (from around 24,000 to 15,000) in the annual number of householder planning applications.

<sup>23</sup> *The Times* 21 September 2006 – appeal decision.

<sup>24</sup> *The Times* 13 October 2005 - first instance decision.

<sup>25</sup> S 33 of the 1997 Act.

<sup>26</sup> S 42 of the 1997 Act.

<sup>27</sup> S 64 of the 1997 Act.

<sup>28</sup> S 6 of the Planning (Listed Buildings and Conservation Areas) Act 1997.

5.10 Alterations to or replacement of windows is a particular problem. This problem has led to instructing the services of relevant professions to prepare 'Window Inspection Reports' and 'Existing Window Certificates'.

5.11 Unlike the scheme of planning enforcement, there is no time limit restriction upon planning authorities taking enforcement action where relevant works are carried out without the benefit of Listed Building Consent. So the absence of a required Listed Building Consent gives rise to problems, often significant problems, in property transactions.

5.12 In Edinburgh, for example, it is estimated that there are about 22,000 listed buildings. This, in turn, means that in a substantial number of conveyancing transactions for listed buildings there will be issues about unauthorised alterations.

5.13 The City of Edinburgh Council's Planning and Building Standards Portal, which is recognised as one of Scotland's best local authority resources, still has information gaps.<sup>29</sup> Plans are not available in all instances and, in turn, there is inadequate information.

5.14 Problems can arise about the apparently simple question of whether a building is a Listed Building or not. An illustration of this point is given in a recent finding of maladministration and the decision of the Scottish Public Services Ombudsman to award compensation where a property owner was wrongly informed by a council officer that her flat was not a Listed Building and she installed new windows on the basis of that information whereas the correct position was that the flat was listed and Listed Building Consent ought to have been obtained for the works.<sup>30</sup> This resulted in the sale of the property owner's flat, and her proposed purchase of another flat, falling through.

5.15 Where there is information about the works in question, relevant professions (such as surveyors and solicitors) are, understandably, unwilling to make a fact and degree judgment about whether the works in question affect the character of a listed building.

5.16 This, in turn, inevitably means that an application for Listed Building Consent for works that have already been carried out will be submitted. In practical terms this involves procuring architects, plans for submission with such an application. It takes a minimum of about ten to twelve weeks after submission of an application to the City of Edinburgh Council and the necessary liaison with Historic Scotland to receive a decision on the application. The implications of this on a potential purchase or sale, such as those outlined in paragraphs 4.5 and 4.6 above can be described as devastating.

## 6. Building approvals

6.1 The Building (Scotland) Act 2003 is the current legislation regulating building control in Scotland. However, practitioners must not only consider the regime under that Act which applies from 1 May 2005 but also the regime under the Building (Scotland) Act 1959 which applies before that date. An overview of the regulatory scheme for building works is included in Appendix B.

6.2 The position about building approvals is similar to the position about Listed Building Consent described above.

6.3 Using Edinburgh as an example again, the information on the City of Edinburgh's Planning and Building Standards Portal is incomplete. In many cases there are no plans available and, in turn, there is inadequate information.

6.4 The availability of approved plans is critical for a number of reasons: for instance, to ensure that the building proposals accord with the proposals that have Planning Permission; to ensure that works have not been carried out following the issue of a Completion Certificate and to ensure that there is no possibility of a

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<sup>29</sup> See <http://www.edinburgh.gov.uk> (this site includes a disclaimer for liability for damages arising from the information provided).

<sup>30</sup> SPSO Case No. 200402100, decision dated 29 August 2006. Report can be accessed at <http://www.spsos.org.uk>

client being found guilty of a criminal offence such as occupying or using a building without or contrary to permission for temporary occupation or use of a building or without a completion certificate being accepted.<sup>31</sup>

6.5 In cases where plans are not available electronically, there are issues (time and cost) about access to the Council archives including the cost of obtaining such access and/or time required to secure access to the Council archives.

6.6 A further practical difficulty is locating the correct property particularly in tenement blocks because with the introduction of Land Certificates it is difficult to trace the name of the proprietor who sought the Building Warrant and to be sure that the information available is the correct information.

6.7 Another practical difficulty is where the required Completion Certificate has not been sought within a reasonable time or the prescribed period because the building control regulations which have to be considered are those which apply at the date of inspection not the regulations at the date the Building Warrant application was made.

6.8 Again there is the potential for significant delay and additional expense and, as a result, an increased likelihood of transactions falling through.

## 7. Addressing existing problems

7.1 A practical resolution to issues of unauthorised alterations in both the planning approval and building approval regimes has been provided by the relevant regulatory authority issuing a 'Letter of Comfort' indicating that no action will be taken regarding the matter(s) in issue.

7.2 However the 'Letter of Comfort' process is very much at the discretion of the individual authorities. Despite the 'Letter of Comfort' process being recognised in the Scottish Building Standards Procedural Handbook as a potential option,<sup>32</sup> some authorities are not prepared to issue 'Letters of Comfort' and require retrospective applications for approvals. Of the authorities willing to issue 'Letters of Comfort' the approach adopted, in terms of process and/or fees for inspections of the property, assessment of the position and, where appropriate, the issue of a 'Letter of Comfort', is not consistent.

7.3 Other practical solutions have been adopted. In Dundee, factors such as problems in relation to the time scales taken to obtain a 'Letter of Comfort' from the building authority gave rise to adopting the practice of obtaining a 'Letter of Comfort' from a local firm of architects. However, while this practice appears to operate to the satisfaction of local agents the local architects' 'Letter of Comfort' is not something universally accepted by agents from outwith Dundee.

## 8. Confirmation of existing problems

8.1 If any confirmation was required about the problems described above, one can refer to a recently introduced market solution, namely indemnity insurance cover for;

- lack of Listed Building Consent;
- lack of building regulation approvals; and
- mutual rights and obligations.

8.2 Insurance is only available for works carried out more than ten years ago and that required Listed Building Consent of a building warrant. The cost of this indemnity insurance cover varies. For instance on properties valued at up to £250,000 the premium ranges between £120 and £160. Thereafter cover is more expensive with the value thresholds greater than £250, 000 and up to £500,000 and thereafter where the value is in excess of £500,000.

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<sup>31</sup> See Appendix A at paragraphs A3.24.

<sup>32</sup> See Appendix A at paragraphs A3.6 and A3.7.

8.3 However, this insurance indemnity cover presumably does not insure against the commission of a criminal offence. For instance, carrying out internal alterations without Listed Building Consent or occupying or using a building without there being either acceptance of a completion certificate or building authority permission for temporary occupation or use of the building.

8.4 Having identified the nature and extent of existing problems arising from unauthorised alterations, this paper considers alternatives to the market solution of indemnity insurance cover. In summary these alternatives are founded on:

- better information,
- those providing information being willing to take responsibility for the accuracy of the information provided, and
- regulatory bodies and relevant professionals agreeing a consistent approach.

## 9. Information as the cornerstone

9.1 The primary goal of 'Efficient Government' is to release resources through efficiency improvements for investing in public services.<sup>33</sup> 'Building a Better Scotland' sets out the Scottish Executive's 'Efficient Government Plan' for 2004/09.

9.2 Harnessing the potential efficiencies offered by Information Technology is a significant element in the key strand of seeking more efficient ways of public sector working.

9.3 Legislation has been enacted to introduce the requirement in property transactions for a Single Seller's Survey.<sup>34</sup>

9.4 Commenting on the recently-announced test to evaluate the use of property sale questionnaires, the then Communities Minister, Malcolm Chisholm, indicated that the Scottish Executive is committed to improving the information available for people in making decisions about buying and selling a home.

9.5 The availability of relevant information which is accurate and comprehensive, which can be properly interpreted and which can be relied upon and which is readily accessible is not only consistent with the aims of the Efficient Government agenda, it is necessary for the delivery of the Scottish Executive's Seller's Survey proposals and is required as part of the Scottish Executive's commitment to improve information for people in making decisions about buying and selling a home.

## 10. Evolution of property information sources

10.1 Property information sources have evolved significantly in recent years. Such information is accessible not only by regulatory bodies and advisers but also by members of the public.

10.2 Examples of property information sources are:

- Council Tax and Property Valuation<sup>35</sup> the Scottish Assessors Association Portal, which has been accessible since late 2004, provides all Scotland Valuation Rolls and Council Tax lists;
- Information about Water and Waste Water Capacity<sup>36</sup> in April 2006 Scottish Water published its Strategic Asset Capacity and Development Plan 2005/06: that Plan, which is to be updated annually, enables enquiries to be made about whether capacity currently exists at a particular location in Scotland or whether work will have to be carried out by Scottish Water at treatment works to allow development to go ahead;

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<sup>33</sup> See <http://www.scotland.gov.uk/Topics/Government/Open-scotland/efficientgovernment/intro>

<sup>34</sup> Housing (Scotland) Act 2006 (asp 1), Part 3.

<sup>35</sup> See <http://www.saa.gov.uk> (which includes a disclaimer for liability for damages arising from the information provided).

<sup>36</sup> The Strategic Asset Capacity and Development Plan is available via Scottish Water's website at <http://www.scottishwater.co.uk> (which includes a disclaimer for liability for damages arising from the information provided).

- Flood Map Information<sup>37</sup> in November 2006 the Scottish Environment Protection Agency ('SEPA') announced access to flood map information following on a three year project funded by the Scottish Executive at a cost of £2m: that information can be used as a strategic flood management tool; it provides a national picture of areas at risk from river and coastal flooding and it facilitates the consideration of flood risk, for existing properties and for proposed development sites, and helps raise awareness about flood risk; and
- Landlord Registration<sup>38</sup> is a central system established in 2006 by the Scottish Executive to facilitate the preparation and maintenance of a register of landlords as required under Part 8 of the Antisocial Behaviour etc (Scotland) Act 2004 and which allows the public to search for details of properties let and the landlords of those properties.
- However, it is of considerable interest (and not inconsiderable regret) to note that each of these sites disclaim any liability for damages arising from the information given.

10.3 The above sources of information complement and supplement information available on core property information websites for planning, listed buildings and building matters.

### Information about Planning matters

10.4 In August 2006, the Scottish Executive announced an investment of £12m over the next two years to deliver efficiency savings by enabling people across Scotland to the planning system. The improved system will afford access to development plans; websites for submitting planning applications and monitoring their progress through the system and clear and simple guides answering the most common questions about the planning process.<sup>39</sup>

10.5 The Scottish Executive's further investment in e-planning builds upon earlier government investment in e-planning through the Scottish Executive's website and its links to local planning authority websites and the websites of other bodies including Historic Scotland and the Scottish Building Standards Agency.<sup>40</sup> However the Scottish Executive Planning website does not provide links to other relevant bodies such as SEPA and the Scottish Assessors Association Portal.

10.6 The opportunity for major efficiency savings by using the investment in e-planning to provide a platform for further e-government efficiency programmes particularly in regulatory services such as buildings matters has been recognised.<sup>41</sup>

### Information about Listed Buildings

10.7 Relevant property information, such as whether a building is a Listed Building or not or whether land is a Scheduled Ancient Monument, can be obtained from the Scottish Executive through the website of its Executive Agency Historic Scotland.<sup>42</sup>

10.8 Historic Scotland is part of the Scottish Executive. However, the Scottish Ministers are not prepared to accept responsibility for the accuracy of the information provided on its website. Therefore it should not be surprising that relevant professionals (Including surveyors and solicitors) are, understandably, unwilling to take responsibility for confirming whether a building is listed or not.

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<sup>37</sup> The Flood Map is available via SEPA's website at <http://www.sepa.org.uk/floodmap> (which includes, as noted at paragraph 3.9 above, a disclaimer).

<sup>38</sup> See <https://www.landlordregistrationscotland.gov.uk/Pages/Process.aspx?Command=ShowHomePage> (which includes a disclaimer).

<sup>39</sup> See <http://www.scotland.gov.uk/News/Releases/2006/08/24093733>

<sup>40</sup> See <http://www.scotland.gov.uk/Topics/Planning> (which includes a disclaimer of liability).

<sup>41</sup> See, for instance, Train B *E-Planning Efficient Government Programme* (2006) 113 Scottish planner 6.

<sup>42</sup> A search for listed buildings can be carried out at <http://www.historic-scotland.gov.uk/listedbuildings> The website includes a disclaimer of liability.

### **Information about Building Control matters**

10.9 Information about Building Control matters can be obtained from the Scottish Executive through the website of its Executive Agency the Scottish Building Standards Agency.<sup>43</sup>

10.10 Information about building control matters can also be obtained through local authority websites.

10.11 The potential for private sector Verifiers dictates that any information system established for building standards information should have the capacity to permit private sector Verifiers to be 'plugged into' the system.

## **11. Conclusions**

This paper identifies that there is a need for:

- a national property database for information on land and buildings as one door access to title and regulatory information (such as planning, listed building and building control matters);
- those (central and local) government bodies providing property information should accept responsibility for the information provided and not to seek to avoid liability for damages caused as a result of acting on any erroneous information provided;
- a review of the relevant regulatory regimes with a view to maximising the information made available (not merely electronic version of registers) and only allowing exclusion of materials where this can be justified; and
- a consistent approach in all matters including the provision of information and in particular a consistent approach practice and costs (both as regards the fee for 'Letters of Comfort' and the time taken to produce same) across Scotland.

## **12. Recommendations**

The principal elements of Unifi's proposals to address the issue of unauthorised alterations and to enhance the accessibility, quality and reliability of property information and, in turn, facilitate the quicker completion of property transactions are that the Scottish Executive should consider:

1. Adopt a consistent style and format of information.
2. Recognise that a central information service should be rolled out across Scotland whilst allowing continual updates from Local Authorities and agents.
3. Make the information available to the broadest stakeholder groups, including the citizen, their agents and other interested parties.
4. Resolve the issue of liability of information quality and avoid the need to purchase insurance against information that is not fit for purpose.
5. Have a moratorium on the period of when certification is required.
6. Consider this initiative in the wider context or the broader need for joined up information, which is fit for purpose and readily available.

It is suggested that the adoption of these recommendations will be a step on the way towards a thoroughly modern, connected and accessible database of all relevant information on land and property in Scotland. This will be of benefit to citizens, those involved in the purchase and sale of land and property and to government.

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<sup>43</sup> See <http://www.sbsa.gov.uk> (which does not include a disclaimer of liability) and Appendix B.

## Appendix A - Overview of the Building (Scotland) Acts

A1.1 The Building (Scotland) Act 2003 (asp 8) ('the Act') replaced the Building (Scotland) Act 1959 ('the 1959 Act') with effect from 1 May 2005. The Act seeks to protect the public interest in matters relating to the design, construction, conversion and demolition of buildings.

A1.2 Since 1964, building control in Scotland has been regulated by the 1959 Act. The scheme of regulation under the 1959 Act remains applicable for building warrant applications made on or before 30 April 2005. The position regarding works completed on or before that date is set out below.

A1.3 The Act does not refer to the establishment of the Scottish Building Standards Agency ('SBSA'). The SBSA was established on 21 June 2004 as an Executive Agency of the Scottish Executive to undertake the national functions of the system set out in the Act.<sup>44</sup>

A1.4 This paper outlines both objectives of the Act and the main provisions of the Act which are relevant to the land and property market in Scotland.<sup>45</sup>

### Objectives of the Act<sup>46</sup>

A2.1 There are a number of objectives of the Act including:

- o to make the system more responsive to the needs of the general public and industry;
- o to provide more information to house buyers on work carried on in buildings; and
- o to support the Scottish Executive aims of providing excellence in public services and encouraging sustainable development.

A2.2 Facilitating access to accurate and comprehensive building standards information, for the community and those advising members of the community, via the internet clearly accords with the above objectives of the Act.

A2.3 It should also be noted that it is not only access to building standards information that is required by individuals and other stakeholders in the land and property market. Simultaneous access to information about matters such as planning permission and listed building consent is also necessary for that market.

### Main provisions of the Act

A3.1 The main provisions of the Act which are relevant to the land and property market are outline in the following paragraphs.

#### Continuing requirements regime<sup>47</sup>

A3.2 The Scottish Ministers are empowered to impose continuing requirements on building owners through regulations so that the purposes of the building regulations are not frustrated once work on a building has been completed and the completion certificate accepted. For instance, there may be a requirement that a sprinkler system must be tested and maintained periodically.

#### Relaxation of building regulations<sup>48</sup>

A3.3 The Scottish Ministers are empowered to dispense with or relax any provision of building regulations in relation to a particular building or description of building where they think that its application is unreasonable. They may give a direction dispensing with or relaxing building regulations in relation to a particular building where any

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<sup>44</sup> For further information about the SBSA see <http://www.sbsa.gov.uk>

<sup>45</sup> The Act is supplemented by regulations including the Building (Scotland) Regulations 2004 (SSI 2004 No. 406); the Building (Procedure) (Scotland) Regulations 2004 (SSI 2004 No. 428) and the Building (Forms) (Scotland) Regulations 2005 (SSI 2005 No. 172 (as amended)).

<sup>46</sup> Scottish Executive Policy Memorandum (SP Bill 65 PM).

<sup>47</sup> S 2 of the Act.

<sup>48</sup> S 3 of the Act.

person (for example, a prospective buyer) makes an application to them. Such an application would be made to the SBSA.<sup>49</sup>

#### Building Standards Assessment<sup>50</sup>

A3.4 The Act imposes a duty on local authorities to carry out a 'building standards assessment' when requested to do so by the owner of a building, this provision is to replace the 'letter of comfort' (also sometimes referred to as 'letter of intent') system. The assessment should identify the extent to which the local authority considers that: the building:

- o complies with the building regulations;
- o has unauthorised works;
- o complies with any continuing requirements; and
- o may be the subject of a defective buildings notice.

A3.5 However, it should be noted that this duty and the provisions of the Act on Crown application have still to be brought into force.<sup>51</sup>

A3.6 The Scottish Building Standards Procedural Handbook includes a diagram of the procedures applying to the transfer of property until the Building Standards Assessment provision is brought into force.<sup>52</sup>

#### Works completed on or before 30 April 2005

A3.7 For works completed on or before 30 April 2005, the options are initiating a 'letter of comfort' process or submitting a late completion certificate. However, as it is the building regulations that have effect when the late completion certificate is submitted, it is unlikely that submission of a late completion certificate will be practical for most cases (and over time will be even less so) because a completion certificate may only be accepted if it confirms that the work has been carried out in accordance with, and now complies with, the building regulations at the time of submission of the completion certificate.

#### Works completed on or after 1 May 2005

A3.8 For works completed on or after 1 May 2005, s 17(4) of the Act requires that a completion certificate, certifying prescribed matters, should be submitted to the relevant Verifier.<sup>53</sup>

#### Verifiers and Certifiers<sup>54</sup>

A3.9 Any proposal for the erection of a new building, to alter or extend an existing building, to convert a building or to demolish a building will normally require permission, a building warrant, before starting any work from a Verifier.

A3.10 The Scottish Ministers are empowered to appoint Verifiers, Approved Certifiers of Design and Approved Certifiers of Construction.

A3.11 Verifiers check applications for building warrants to construct or demolish buildings; to provide services, fittings or equipment in buildings and to convert buildings.

A3.12 The Scottish Ministers have the power to appoint private sector Verifiers. However, to date they have only appointed public sector verifiers (all 32 Scottish local authorities) for the period 2004 - 2010.<sup>55</sup>

A3.13 Approved Certifiers of Design are responsible for either specific aspects of the design of buildings (for instance the structure or energy performance) or specific parts (such as a space heating system). If satisfied that the proposed design meets the requirements of the building regulations, an Approved Certifier of Design may issue a certificate for submission with an application for building warrant.

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<sup>49</sup> Form SBSA1 at [http://www.sbsa.gov.uk/current\\_standards/Foms.htm](http://www.sbsa.gov.uk/current_standards/Foms.htm)

<sup>50</sup> S 6 of the Act.

<sup>51</sup> See the Building (Scotland) Act 2003 (Commencement No. 1, Transitional Provisions and Savings) Order 2004 (SSI 2004 No.404).

<sup>52</sup> See [http://www.sbsa.gov.uk/current\\_standards/proc\\_handbook.htm](http://www.sbsa.gov.uk/current_standards/proc_handbook.htm) at page 57 and 'Building (Scotland) Act 2003 - Erratum to Handbook and Forms, page 4, at [http://www.sbsa.gov.uk/current\\_standards/LetterstoChiefExecutivesofVerifiers.htm](http://www.sbsa.gov.uk/current_standards/LetterstoChiefExecutivesofVerifiers.htm)

<sup>53</sup> See Form 6 (Completion Certificate where no Building Warrant Obtained) of the Building (Forms) (Scotland) Amendment Regulations 2006 (SSI 2006 No. 163).

<sup>54</sup> S 7 of the Act.

<sup>55</sup> See [http://www.sbsa.gov.uk/current\\_standards/verification.htm](http://www.sbsa.gov.uk/current_standards/verification.htm)

A3.14 Approved Certifiers of Construction are responsible for the construction or installation of specified parts of a building, for instance the structural frame, the electrical installation or a combustion appliance. If satisfied that the construction has been completed in accordance with the building regulations as they applied at the time of the application for the building warrant, Approved Certifiers of Construction can issue a certificate for submission with a completion certificate.

A3.15 Verifiers will give a discount on the building warrant fee and a refund on considering whether to accept a completion certificate if Approved Certifier certificates are submitted along with the application or certificate (as the case may be). A register of Approved Certifiers is kept by the SBSA.<sup>56</sup> However, the Approved Certifier will, of course, charge for the issue of any certificate.

#### Completion Certificate<sup>57</sup>

A3.16 A Completion Certificate is needed to confirm that a building has been constructed, altered, or converted in accordance with the building warrant and the relevant regulatory provisions.

A3.17 Once a Completion Certificate is submitted the Verifier must make reasonable inquiry to establish that the work complies with the building warrant. A Verifier must accept a Completion Certificate if the works are compliant and must issue acceptance or a reasoned decision for refusal within 14 days of receipt of the Completion Certificate.

#### Registers and records<sup>58</sup>

A3.18 From 1 May 2005, Scottish local authorities must keep a Building Standards Register for their respective administrative areas. These Registers contain information on:

- o applications for building warrants and amendments to such warrants;
- o decisions on applications for building warrants;
- o submissions of completion certificates; and
- o decisions on acceptance or refusal of completion certificates.

A3.19 There is a requirement to keep in electronic form a permanent record of a list of applications including:

- o certificates from Approved Certifiers of Design or Approved Certifiers of Construction submitted with building warrant applications and certificates of completion;
- o any conditions relating to the issue of building warrants;
- o any continuing responsibilities imposed by building warrants;
- o decisions and copies of notices in connection with building regulation compliance notices; continuing requirement enforcement notices; building warrant enforcement notices; defective building notices and dangerous building notices

A3.20 Other records such as copy building warrants, copy completion certificates, the principal drawings and specifications, energy certificates for dwellings and other relevant documentation are kept normally for 25 years and in complex cases for 50 years or such later date as agreed by the local authority archivist and its building standards manager.

#### Inspection of records and applications<sup>59</sup>

A3.21 Subject to the following paragraph, the Building Standards Register must be kept open for public inspection at all reasonable times and should allow searches by name or registration number of Approved Certifiers. Drawings, specifications, certificates and other information (such as soil tests) must be available for inspection during normal office hours.

A3.22 For individual dwellings access to copy building warrants etc as described in paragraph B3.20 above is limited to any owner, occupier, tenant or prospective tenant of the dwelling. For other types of building where there

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<sup>56</sup> See <http://www.sbsa.gov.uk>

<sup>57</sup> See s 17 - 21 of the Act.

<sup>58</sup> S 24 of the Act and regulation 57 of the Building (Procedure) (Scotland) Regulations 2004.

<sup>59</sup> Regulation 58 of the Building (Procedure) (Scotland) Regulations 2004 and section 8.2 of the Scottish Building Standards Procedural Handbook.

is a security concern (such as a bank), access to information should only be allowed with the written permission of the owner of such a building.

#### Criminal offences

A3.23 The Act specifies a number of criminal offences, such as it is a criminal offence to:

- begin work for which a building warrant is required before first obtaining such a warrant;<sup>60</sup> or
- occupy or use a new building (other than solely for the purpose of its construction or conversion) without either a Verifier having accepted the completion certificate or compliance with a Verifier's permission for the temporary occupation or use of the building.<sup>61</sup>

A3.24 The Act includes statutory defences in relation to various criminal offences. The above criminal offence provisions give rise to various needs including:

- contractors and developers, as well as owners, need to know that a building warrant is in place and obtain a copy of the warrant ; and
- an owner or tenant needing to know that a completion certificate has been accepted.

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<sup>60</sup> S 8(2) of the Act.

<sup>61</sup> S 21(5) of the Act.