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## **Internal Scrutiny 16 June 2011**

### **The Purpose and Function of Planning and Its Enforcement Processes**

#### **1.0 Background**

- 1.1 As part of the Council's functions in exercising the provisions of the Town and Country Planning Acts, an important element of the Local Planning Authority's (LPA) service seeks to enforce planning controls where works that are carried out without the benefit of consent are examined and appropriate actions, sometimes involving legal actions, are undertaken.
- 1.2 The note outlines the general approach to enforcement, including the primary responsibility of LPAs in the matter and the decisive issue of whether a breach of planning control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest. A breach of planning control would result in formal enforcement action only if the LPA determined that it was expedient and proportionate to do so in all the circumstances. A subsequent prosecution for a criminal offence arising out of a breach of planning control would only be commenced if the standard legal tests requiring sufficient evidence to secure a reasonable prospect of conviction and protection of the public interest were met.

#### **2.0 The Legal framework**

- 2.1 Planning legislation forms a distinct statutory code aimed at controlling and managing the development of land and whilst there have been iterations of planning type controls, the main system that is operation today stems from its original inception in 1947.
- 2.2 Under the English system of planning control, when somebody applies for planning permission, they are effectively requesting a grant of their rights back to develop their land. Sometimes this is granted by virtue of special development orders i.e. permission is granted by the Government directly and in other instances, by a Local Planning Authority (LPA). There are instances when somebody carries out works that are neither granted by a development order or by the LPA and in such instances enforcement procedures need to be contemplated by the LPA.
- 2.3 It is important to note that to develop land without planning permission is not a criminal offence but once an Enforcement Notice has been served to continue work/operations or to leave development standing in contravention to 'a live and effective' notice is a criminal offence.

- 2.4 There has to be a sanction to ensure that unauthorised development can be prevented, and in particular unacceptable development. The sanction provided by the law is found within Part VII of the 1990 Town & Country Planning Act ('TCPA'). The law relating to the enforcement of planning control has strengthened over the years with the last review introduced under Planning and Compensation Act 1991 and in addition to this primary provision, there has been further guidance and circulars issued from the Government including Circular 10/97 – Enforcing Planning Control: Legislative Provisions and Procedural Requirements and Planning Policy Guidance Note 18 – Enforcing Planning Controls. This guidance is taken into account by the LPA when it is exercising its statutory enforcement powers.
- 2.5 The legal planning framework is aimed solely at protecting public amenity from operations and as such issues centering upon land ownership are not strictly planning matters. Land owners themselves exercise their own controls over whether development can go ahead, whereas planning considers whether a development itself is acceptable.

### **3.0 Types of Notices and Actions**

- 3.1 There are a number of different actions that a LPA can take in the consideration of how to remedy breaches of planning control. These include -
- Planning Contravention notices
  - Breach of Condition notices
  - Enforcement Notices
  - Stop Notices and Temporary Stop Notices
  - Injunctions and Prosecutions
  - Untidy Land and Building notice
- 3.2 *Planning Contravention Notices (PCN)* – To determine the appropriate course of action to be taken in dealing with breaches or alleged breaches of planning control, the LPA must be sure of its facts and S171C and 171D of the TCPA enables the LPA to demand information from the occupier of land as to his interest and the nature of operations or actions that have been carried out. Essentially it is an information gathering tool and the serving of notices usually requires land searches to be carried out to clarify land ownership details. The serving of a PCN in no way prejudices any other actions that may ensue and is designed to ensure that any enforcement action takes place on the basis of correct information Failure to comply with the notice or provision of false or misleading information will render the person served with the notice liable to potential prosecution for a criminal offence and it may also affect any rights to compensation that may apply if a stop notice is served. There is no right of appeal against this notice. A PCN can only be used when the LPA suspect a breach of planning control has taken place. A more restrictive form of information request can be used in other circumstances under section 330 of the TCPA.
- 3.3 *Breach of Condition Notices (BCN)* – Under s171A TCPA failure to comply with a condition or limitation imposed by a planning permission constitutes a breach of planning control. S187A enables the LPA to serve a BCN to require a developer to comply with the notice requirements and the conditions imposed by the planning permission. The notice must specify the steps to be taken and time for

compliance. There is no right of appeal against the notice and non-compliance with it is actionable through the Magistrates court.

- 3.4 *Enforcement Notices (EN)* – Under s172 of the TCPA the LPA can issue an EN where it appears to them that there has been a breach of planning control and works, development, engineering operations or a change of use has occurred and it is *expedient* to issue the notice having regard to the development plan and any other material considerations. The notice must specify the breach that has occurred, the reasons for issuing the notice including relevant planning policies under consideration, the necessary steps to remedy the breach and a time period for compliance. Periods specified should not be less than 28 days. There is a right to appeal against this notice under 174(1) of the TCPA, which should be made to the Planning Inspectorate and the appeal must be submitted within the respective time period as stated on the notice.
- 3.5 In the event of the notice being appealed, the Inspector appointed can choose to vary, uphold or quash the notice and this latter step would effectively grant permission. Steps required on any notice must be reasonable and achievable. Such steps can include –
- the alteration or removal of any building, structure or works;
  - the carrying out of any building or other operation;
  - any activity on the land not to be carried on except in compliance with the notice;
  - The contour of a deposit of refuse or waste materials on land to be modified by altering a gradient for example.
- 3.6 *Stop Notices* – S183 of the TCPA permits an LPA to issue a stop notice where it considers it expedient to do so by prohibiting a particular activity from taking place, either building work or an operation. A stop notice can be served at the same time as an enforcement notice but cannot be served after an enforcement notice as the failure to comply with the enforcement notice would be a criminal offence. Fines applicable can range from £2000 to £20000. These notices are rarely used. LPA's have been reluctant to use the stop notice procedure due to the ability of a developer to seek compensation for the resultant financial loss that arises as a result of the notice should the accompanying enforcement notice be quashed.
- 3.7 *Temporary Stop Notices* – This provision was introduced by the Planning and Compensation Act 2004 and can be issued in much the same way as a stop notice but has the effect of ceasing works for 28 days whilst further investigations can take place. There is no right to appeal and the operation can continue should no further notices or requirements of other notices such as an enforcement notice be served. There is no right of appeal against a temporary stop notice.
- 3.8 *Injunctions* – This is a rare process that LPA's can apply directly to the courts to remedy breaches or threatened breaches and can be used where there may be doubts over who has the power to remedy the breach. The use of injunctions are generally only used where there are very serious and urgent cases involved and time is of the essence and there is a complete disregard of the requirements of a stop notice. The courts do not have to have mind upon whether there might be a grant of planning permission for unlawful works.

- 3.9 *Prosecutions* – This course of action is used where the requirements of a notice have been ignored or otherwise not complied with. Additionally, where advertisements have been erected without consent and are deemed to be injurious to amenity or highway safety, the LPA can go straight to prosecution for a criminal offence and the Court in such instances may require the developer to seek removal of the signage.
- 3.10 *Untidy Land and Buildings Notice* – Under s215 TCPA, where it appears that land or buildings are causing harm to the amenities of the area, a notice can be served upon the owner or occupier to remedy the harm. The notice will specify steps to be carried out and the time for compliance. Steps can include the replacement of broken windows, repainting, re-fixing of broken drainpipes and the clearing of debris from land.
- 3.11 *Immunity from Enforcement* – There are instances when development is immune from enforcement. Under s191 and s192 TCPA, these sections allow for the LPA to determine whether or not an existing or proposed development is/would be lawful. The applicant applies to the LPA together with supporting information to demonstrate whether or not a development complies with permitted development rights and thus would be lawful if/when carried out.
- 3.12 Additionally, where built development has been carried out and has remained unchallenged for a period of 4 years, the development is deemed to be lawful. In the instances of changes of use, the period of lawfulness is 10 years. A key factor is that the burden of proof rests with the applicant/developer to demonstrate that development is lawful under the provisions of s191 and s192.
- 3.13 The ultimate sanction of legal proceedings is considered to be a last resort. This is at least in part because of the potential for serious costs arising from successful action or more particularly unsuccessful action when the costs can be considerable.

#### **4.0 Guidance on When to Enforce**

- 4.1 How LPAs organise the administrative function of enforcing planning control is for each authority to decide. The organisation should correspond to the volume and complexity of enforcement casework in each LPA's area and be sufficiently flexible to adapt to short-term increases in the demand for enforcement. All authorities should ensure that there is a close and co-operative working relationship between the Planning Department and the Solicitor's (or Secretary's or Chief Executive's) Department. Without such an effective working relationship, formal enforcement action (which depends for its success upon speed of assessment and process) may be hampered by poor communications and misunderstandings. Public criticism is then likely, especially if statutory time limits for taking enforcement action are allowed to expire because of administrative delay. Unless they have done so recently, all LPAs are recommended to carry out a thorough review of the effectiveness of their procedural arrangements for planning enforcement; and, where necessary, to introduce revised arrangements. We have over time continued to improve on our internal processes but it may now be appropriate to undertake a more formal review.

- 4.2 In considering any enforcement action, the decisive issue for the LPA should be whether the breach of control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest. Enforcement action should always be expedient, proportionate and commensurate with the breach of planning control to which it relates (for example, it is usually inappropriate to take formal enforcement action against a trivial or technical breach of control which causes no harm to amenity in the locality of the site). The concept of under enforcing has been developed to accommodate this.
- 4.3 Where the LPA's initial attempt to persuade the owner or occupier of the site voluntarily to remedy the harmful effects of unauthorised development fails, negotiations should not be allowed to hamper or delay whatever formal enforcement action may be required to make the development acceptable on planning grounds, or to compel it to stop.
- 4.4 Planning Enforcement is not mandatory and an enforcement notice should not normally be issued solely to "regularise" development which is acceptable on its planning merits, but for which permission has not been sought. Accordingly LPAs who issue a notice in these circumstances will remain at risk of an award of costs against them at an enforcement appeal and liable to criticism from the Local Government Ombudsman for poor administrative practices. If it is considered that planning conditions could remedy the impacts, an application for planning permission should be encouraged and if this does not happen, an enforcement notice could require appropriate steps.

#### 4.5 **Processing Issues**

As stated there are many different approaches to secure enforcement including under enforcing or no action at all where breaches are trivial. However, when action is instigated there are many issues that can frustrate the enforcement process.

- 4.6 *Receipt, Investigation and Processing* - On receipt of a complaint, the call or correspondence is logged into the record system within 3 days and a site visit is undertaken within 10 days. Complainants are written to informing them of a reference number and confirmation of the start of the investigation

Following the site visit, ownerships are ascertained and they are written to. Where no response is received, this is further chased up. Respondents, if at all, can acknowledge and enter into dialogue on the issues in question. They can offer to resolve the breach, which can be completely, in part or not at all. Further reminders and visits need to be undertaken to determine whether there has been any compliance before determining the most appropriate form of action to take. This process in itself can be lengthy but largely unavoidable to be firstly, in the spirit of the guidance and secondly to demonstrate 'reasonableness' on behalf of the LPA.

- 4.7 *Land Searches* - At the start of most formal enforcement proceedings, notices must be served on anyone who has an interest in land. This would require a Land Registry search to be carried out to identify owners and interest. In some instances, this can now be done on line and this recently introduced process does help performance. However, if the search is for 'land' as opposed to a

fixed address, this needs to be done by post. A turnover of some 3 weeks is commonplace for this.

- 4.8 *Consultation* – The compliance with certain requirements can involve the need to consult not only internal consultees, but also external bodies e.g. The Environment Agency. External agencies do have their own workload to consider and whilst they respond to significant issues quickly, there is still an element of delay involved.
- 4.9 *Negotiation* – This is encouraged within PPG18 and seeks to avoid formal action being taken. This can take time and can result in a positive outcome. However, negotiations can also include the granting of additional time for before proceeding with a threatened formal action or steps required within a notice. Where this is considered to be a reasonable request, it can assist the Council's case in the event of an appeal or prosecution to show that leniency and understanding has been exercised. However, depending upon the issue in hand, there are instances when additional time would not be granted and each case must be considered on its merits.
- 4.10 *Applications and Appeals* – Whilst unauthorised works might have taken place but could be remedied by an application with conditions or a notice is appealed against, the enforcement process effectively stops until the outcome of the application or appeal is known. Work still goes on in the background to prepare formal enforcement action to ensure that actions are picked up immediately following the outcome of the application or appeal that is suspected to be lost by the applicant. An essential element of this is the close working with Planning Officers, Enforcement Officers and Legal Services.
- 4.11 Before any formal enforcement action is taken, both planning and legal officers shall give careful consideration to each case on its own particular merits.

## **5.0 Local Enforcement Actions and Performance**

- 5.1 A quarterly enforcement report is presented to the Council's Planning Control Committee and annually, a full report including comparison statistics is presented. This report presents a brief analysis of Enforcement performance for the year 2010/11 and table 1 below, shows a comparative statistical analysis of performance over the past 5 years. The report also provides an update on the Enforcement Action since the last report.
- 5.2 In Bury, The Enforcement Team currently comprises of a Senior Planning Enforcement Officer, a Planning Enforcement Officer and a Planning Enforcement Technician, who are employed full time. The Officers deal with complaint cases on a Borough – wide basis, in accordance with the Council's Customer Charter for the Planning Enforcement Service.
- 5.3 The Enforcement Team deals with complaints regarding actual and alleged breaches of planning control; which includes monitoring development sites and planning conditions; investigating complaints regarding uses of land and buildings; dealing with unauthorised advertisements; complaints of untidy and dilapidated land and property; unauthorised works to listed buildings and buildings within Conservation Areas.



- 5.4 Such complaints are received from members of the public, other Agencies, Councillors and MP's. These are received by various sources including letter, email, telephone, face to face. Complaints will only be recorded if they raise legitimate planning considerations. If issues are raised which would be more appropriately dealt with by another section of the Council, then the details are forwarded to the appropriate person. Anonymous complaints are not usually dealt with unless they allege a serious breach of planning control is or has been carried out.
- 5.5 The levels of priority are from level 1 (highest) to Level 4 (lowest). However, if the complaint is high priority, for example demolishing a Listed Building without consent (Level 1), officers will attend the scene as soon as possible, prior to the complaint being logged, to ensure there is no delay in dealing with the case.

	<b>2006/7</b>	<b>2007/8</b>	<b>2008/9</b>	<b>2009/ 10</b>	<b>2010/ 11</b>
Number of Complaints received	628	569	576	632	630
% where initial site visit within 10 working days	88%	88%	77%	96%	97%
Number of complaints resulting in a breach of Planning Control	298	257	404	432	432
% of breaches where Enforcement Action is taken within 13 weeks	79%	69%	74%	75%	77%
Number of Enforcement Notices served	27	18	28	30	37
Number of Stop Notices served	0	0	0	0	0
Number of Breach of Condition Notices served	2	7	4	11	14
Number of Section 215 Untidy land/building Notices served	7	13	2	15	16
Number of Temporary Stop Notices served	13	3	2	4	4
Number of Planning Contravention Notices served	18	15	15	32	33
Number of Injunctions served	0	0	0	0	0
Number of Prosecutions made	4	2	9	10	13
Number of Formal Cautions issued	0	0	0	0	0
Number of Works in Default actions taken	0	0	0	0	1
Number of High Hedges Remedial Notices served	6	1	0	9	0

*Table 1 – Comparison of complaints received within last 5 years*

- 5.6 During the period 2010/11 the Enforcement Team received 630 complaints, 432 of which were breaches of Planning Control, which remains at a high level. This trend may be a reflection of the current financial and economic position. The vast majority of these cases in this period were resolved without recourse to formal Enforcement Action. The table 1 above includes reference to 2 performance standards in terms of the speed of the responses to a) site visits and b) cases being closed.
- 5.7 The majority of complaints received are ultimately resolved within 13 weeks of receipt. For the period 2010 /11; 77% of complaints were closed within this time period (see Table 1 above). There are a number of reasons that cases may remain open beyond this time. Examples could include awaiting a decision of a planning application submitted; awaiting the receipt of other relevant information such as from Land Registry; involvement with another Agency.
- 5.8 Example of Cases:
- Kenyon Street Ramsbottom – 22/1/09 - Alleged unauthorised tipping of 20,000 tonnes of waste materials within a former mill building in contravention to planning conditions that required pre-commencement works to be undertaken. Resultant materials removed by a new owner and other illegal activities uncovered, which the Police became involved with.
  - 217 Nuttall Lane (3 separate cases) – 13/2/09, 14/9/09, 12/4/11 - Unauthorised use alleged for car repairs from home; erection of unauthorised buildings and containers in connection with the use. Use has since been found to be lawful but the scale and intensification has resulted in the buildings being brought/erected on the site. Planning applications have been submitted and refused. There is currently an outstanding appeal for the erection of a building on site to accommodate the working on cars and the existing unauthorised buildings and following the serving of an enforcement notice, we are currently monitoring the site to ensure compliance.
  - A s215 Notice was served upon the owners of 43 School Street, Radcliffe. The property had fallen into a state of disrepair and the notice required the property owners to instigate repairs, window replacement and gutter repairs. The outcome of the action can be seen in the photos below of the property before and after.



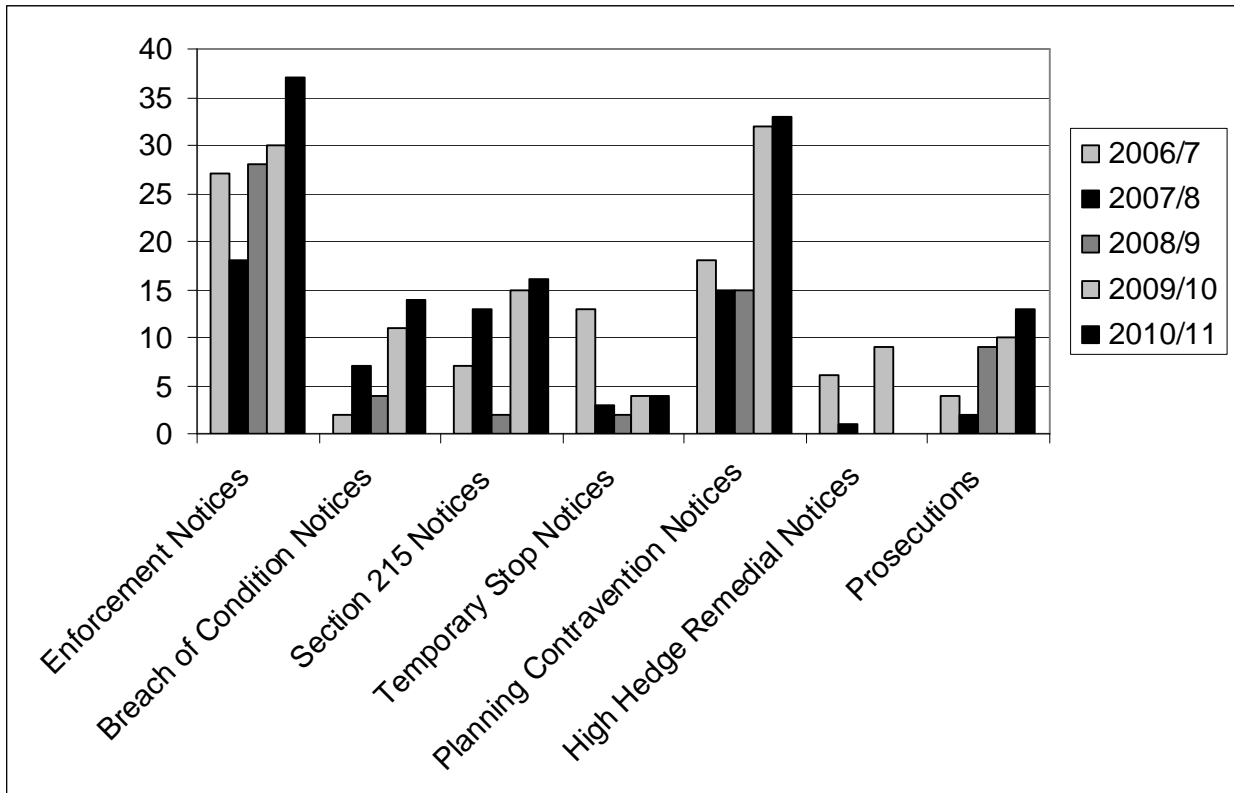


## 6.0 Formal Notices Served/Actions Taken

6.1 During the past 12 months the number of cases which have been pursued through formal action remains at a high level with total of 104 formal notices having been served and 13 prosecutions made, for non-compliance with notices served. This has resulted in fines totalling £9,893 being imposed. Outstanding Section 106 monies totalling £9,282.50 have also been recovered from developers, who were reluctant to pay the money the subject of these Agreements.

The graph overleaf shows a comparison of notices served and actions taken over the past 5 years.

Figure 1: Comparison of Notices served and Actions taken over the last 5 years



## 6.2 Enforcement Action Nationwide

A comprehensive list of Notices served and Actions taken in comparison to other LPAs can be seen at Appendix 1 for the period 1/1/10 to 31/12/10. It is interesting to note that Bury have served more enforcement notices by far than any other Authority in Greater Manchester, and in the North West. It is strongly considered that this performance is a direct result of the clear Enforcement approach that the Council operates, which is underpinned by its Enforcement Charter, committed staff, operating an efficient system of enforcement with the number of cases allowed on appeal are very limited in number.

## **7.0 Conclusion**

- 7.1 The number of Notices being served and formal action being taken is remaining at a high level. The majority of cases continue to be resolved without recourse to formal action.
- 7.2 The enforcement section is now encountering a rise in cases of non-compliance with enforcement notices served, which is resulting in more prosecutions being made to secure compliance. It has also been noted that there has been a rise in the number of complaints relating to unauthorised building works taking place, which require planning permission. This has led to an increase in the number of retrospective planning applications submitted. This may be attributable to the present financial climate, and certain members of the public attempting to avoid paying planning fees. It is useful to note here that the Planning fee regime is about to change to a full cost recover system and hence some fees are expected to increase.
- 7.3 The service provided is primarily a reactive one in that we respond to complaints received from members of the public.

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