



Performance Management Board

25 September 2018

Planning Enforcement Update

Report of the Executive Manager – Communities

1. Purpose of report

- 1.1. This report provides information on the delivery of the Council's Planning Enforcement function, including resources currently delivering the function and the performance of the service.
- 1.2. The report provides The Board with the opportunity to better understand the procedures followed when investigating alleged breached of planning control and to comment on the performance of the service.

2. Recommendation

It is RECOMMENDED that The Board consider, make comment on and endorse the work and performance of the Planning Enforcement team as outlined in this report and the accompanying presentation.

3. Reasons for Recommendation

- 3.1. This is an opportunity for the Board to comment on the Council's Planning Enforcement procedures and identify any areas for further improvement.

4. Supporting Information

- 4.1. The current Corporate Enforcement Policy was adopted in March 2010 and was last revised in June 2017. The policy is an umbrella policy which applies to legislation enforced or administered by the Council in the following service areas and to officers engaged in enforcement activity in those areas:
 - a) street cleansing
 - b) 'enviro' crime – fly tipping, graffiti, litter, abandoned vehicles
 - c) environmental health – food safety, health and safety, private sector housing, environmental protection, statutory nuisance, dogs
 - d) licensing
 - e) building control
 - f) planning and development control (now referred to as Planning and Growth)
 - g) benefit fraud.

- 4.2. The primary purpose of enforcement is to protect the public. This includes protecting health and safety, the environment, business and legitimate economic interests. The policy sets out how the Borough Council will generally carry out its enforcement functions and each service will then operate in accordance with its own practices and legislative requirements. This report deals solely with the Planning Enforcement function.
- 4.3. Unlike the determination of planning applications, which is a statutory function, the enforcement of planning control is a discretionary service. However, it is acknowledged that the effectiveness of the enforcement function can impact on the reputation of, and public confidence in the planning service. This is highlighted in paragraph 58 of the National Planning Policy Framework. This paragraph also highlights that *“Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control.”*
- 4.4. A breach of planning control is defined in section 171A of the Town and Country Planning Act 1990 (the 1990 Act) as: the carrying out of development without the required planning permission; or failing to comply with any condition or limitation subject to which planning permission has been granted. Important factors to consider include the extent of the powers of the planning service which is only concerned with ‘development’. Section 55 of the 1990 Act provides the meaning of development as *“...the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”* Therefore, in investigating any alleged breach of planning control, it is first necessary to consider if the matter amounts to development.
- 4.5. It is also important to acknowledge that, with a few exceptions, development carried out without planning permission, or in breach of a condition, is unauthorised and not illegal. The exceptions include demolition of a listed building, work to/felling of a tree which is the subject of a Tree Preservation Order and the display of an advertisement without consent. In the case of all other development/activities, an offence is only committed on failure to comply with a notice, e.g. enforcement notice.
- 4.6. The Council is required to act in a timely manner when dealing with planning enforcement. In the majority of cases, planning authorities will be unable to undertake enforcement if no action is taken within:
- i) 4 years of substantial completion (for a breach of planning control consisting of operational development)
 - ii) 4 years for an unauthorised change of use to a single dwellinghouse
 - iii) 10 years for any other breach of planning control

Exceptions to these time limits apply where there has been deliberate concealment of planning breach, although cases such as this are relatively rare.

Approach to investigations and available tools

- 4.7. There are a range of ways to tackle alleged breaches of planning control. The guidance in the National Planning Practice Guidance advocates that action should be proportionate to the alleged breach. Furthermore, the NPPG advocates that breaches of planning control can often be resolved more quickly through discussion and negotiation without formal action. In particular, this can be the case where a breach of control may be the result of a genuine mistake and once the breach is identified, the owner or occupier takes immediate action to remedy it. Enforcement action should, however, be proportionate to the breach of planning control to which it relates and taken when it is expedient to do so.
- 4.8. Action may not be appropriate in some circumstances, for example where there is a trivial or technical breach of control which causes no material harm or adverse impact on the amenity of the site or the surrounding area; where development is acceptable on its planning merits and formal enforcement action would solely be to regularise the development; or if it is considered that an application is the appropriate way forward to regularise the situation and conditions may be necessary to impose restrictions on the development to avoid adverse impacts.
- 4.9. Breaches of planning control are not condoned by the Council, however, enforcement powers should not be used punitively or applications for retrospective development, perhaps as a result of enforcement investigations, refused because the development has already been commenced/completed. In these circumstances, the application should be considered on its merits regardless of fact that the development has already taken place. In such circumstances, the applicant has clearly taken a risk in carrying out development without the required permission. If development is unacceptable and the adverse impacts cannot be mitigated, for instance through the use of conditions, it may be appropriate to refuse permission and take enforcement action to remedy the breach, e.g. remove the offending development or cease an activity.
- 4.10. In determining whether it is expedient to take formal action, it will be necessary to apply a public interest test, including identifying and assessing the harm arising from the development, and to have regard to the development plan and any other material considerations.
- 4.11. Before deciding whether to take formal action, or what action to take, the Council may serve a Planning Contravention Notice (PCN) to collect information, for example about the development which has been undertaken or the activities that are taking place and the ownership of the land/buildings. It is in itself an offence to fail to respond to a PCN, or to provide false or misleading information. Where it is considered expedient to take formal action, there are a number of tools available to Borough Council, as detailed in the following paragraphs.

- 4.12. Enforcement Notice – An enforcement notice should only be issued where the local planning authority is satisfied that it appears to them that there has been a breach of planning control and it is expedient to issue a notice. A notice can be served on the occupier and owner of the land and, where appropriate, anybody else who has an interest in the land. A notice must identify the breach that has occurred, the harm arising from the breach, the steps that are required to remedy the breach, and the time allowed for compliance. The notice must specify the date on which it takes effect and this should be a period of not less than 28 days from the date of service. The person(s) receiving the notice have a right of appeal against the notice, which must be lodged with the Planning Inspectorate before the date on which the notice takes effect. Where no appeal is lodged and the notice takes effect, and a failure to comply with the requirements of the notice shall constitute an offence.
- 4.13. Breach of Condition Notice – where it appears that a breach of condition may have occurred, the Council may serve a Breach of Condition Notice (BCN). A BCN requires the recipient to secure compliance with the terms of a planning condition or conditions, specified by the local planning authority in the notice. The period for compliance with a BCN may be not less than 28 days. A person failing to comply with the requirements of a BCN shall be guilty of an offence.
- 4.14. Temporary Stop Notice – temporary stop notices are a powerful enforcement tool that allows local planning authorities to act very quickly to address some breaches of planning control, such as unauthorised activities, where it is expedient to do so. Temporary stop notice may prohibit a range of activities, including those that take place on the land intermittently or seasonally. Because a temporary stop notice is prohibitory, it is not appropriate for use in any circumstances which require positive action to be taken in response to it, e.g. to remove a structure.
- 4.15. This tool should not be used lightly, the effect of issuing a temporary stop notice will be to halt the breach of planning control, or the specified activity immediately. This can have immediate serious consequences on a business. Before issuing a temporary stop notice, the local planning authority must be satisfied that there has been a breach of planning control and that “it is expedient that the activity which amounts to the breach is stopped immediately” and a cost benefit analysis must first be undertaken. Furthermore, it would be good practice to discuss, whenever practicable, with the person carrying on the activity whether there is any alternative means of production or operation which would overcome the objections to it in an environmentally and legally acceptable way.
- 4.16. A temporary stop notice may take effect immediately on service/display of the notice and must specify the activities that are required to cease. The notice is only effective for a maximum period of 28 days and it is not possible to serve a further temporary stop notice unless some form of enforcement action has been taken. In certain circumstances compensation may be payable.

- 4.17. Stop Notice – a stop notice can prohibit any or all of the activities which comprise the alleged breach(es) of planning control specified in a related enforcement notice, ahead of the deadline for compliance in that enforcement notice. Therefore, unlike a temporary stop notice, a stop notice may not be served without an enforcement notice first being served or served consecutively with the stop notice. The stop notice must specify the date on which it takes effect, which may not be less than 3 days, or more than 28 days from the date of service. Where the associated enforcement notice is quashed, varied or withdrawn or the stop notice is withdrawn compensation may be payable in certain circumstances. A person who contravenes a stop notice after a site notice has been displayed, or the stop notice has been served on them, is guilty of an offence.
- 4.18. Planning Enforcement Order – this is a relatively new tool and may be used where the normal time periods for immunity, a period after which enforcement action cannot be taken, has passed. Where a person deliberately conceals unauthorised development, the deception may not come to light until after the time limits for taking enforcement action have expired. A planning enforcement order enables an authority to take action in relation to an apparent breach of planning control, notwithstanding that the time limits may have expired.
- 4.19. Injunction – where it is considered expedient for any actual or apprehended breach of planning control to be restrained, an application can be made to the High Court or County Court for an injunction to restrain a breach of planning control.
- 4.20. Section 215 Notice (power to require proper maintenance of land) – where it appears to the local planning authority that the amenity of a part of their area, or of an adjoining area, is adversely affected by the condition of land in their area, they may serve on the owner and occupier of the land a notice requiring such steps for remedying the condition of the land as may be specified in the notice to be taken within such period as may be so specified. The period for compliance with the notice may not be less than 28 days. If the person receiving the notice fails to comply with the steps specified in the notice within the specified period, they shall be guilty of an offence and may be subject to legal proceedings. The right of appeal against a S215 notice is through the magistrates court and such appeal must be lodged prior to the notice taking effect.

Resources

- 4.21. The enforcement function is delivered by two dedicated enforcement officers who report to a Principal Planning Officer (PPO). The PPO also has other responsibilities including management of the Conservation Officer and two planning technicians, and determining planning applications under delegated powers. The PPO also carries a caseload of planning applications. In addition, planning officers are available to provide support and advice to the Enforcement Officers. A comparison with other authorities in Nottinghamshire is provided in the table below:

Authority	Number of enforcement complaints received 2017/18	Number of dedicated enforcement staff (fte)
Ashfield District Council	202	2
Bassetlaw District Council	251	1
Broxtowe Borough Council	384	1 (increased to 2 fte, post 17/18)
Gedling Borough Council	209	1
Mansfield District Council	376	1
Newark and Sherwood District Council	466	2
Nottingham City Council	115	1.25
Rushcliffe Borough Council	307	2

NB - Figures may not provide direct comparison of cases and staffing resource as the recording of cases, and responsibilities and duties may vary.

Performance

4.22. The enforcement function is normally reactive, i.e. the officers respond to complaints from residents, elected councillors etc and investigate any alleged breaches of planning control. However, in view of the current pressure for housing development within the Borough, a system has recently been established and is in the process of being rolled out to proactively monitor the larger developments in order to ensure compliance with conditions. The table below sets out the number of investigation complaints received in each financial year from 2013 to 2018.

	2013/14	2014/15	2015/16	2016/17	2017/18
Number of enquiries received	377	368	333	381	307

4.23. Quite often, when an investigation is undertaken and a site is visited, it may transpire that the complaint is unfounded i.e. there is no breach of planning. This may be, for example, that what is being undertaken does not amount to development, the development is permitted development (by virtue of the provisions of the Town and Country Planning (General Permitted Development) Order 2015), work was being carried out in accordance with planning permission granted, or in the case of the use of buildings/land, the activity did not amount to a 'material change of use'. In 2017/18, 152 the complaints received during the period (nearly 50%) were found to be unfounded. However, where a breach has occurred, and this cannot be resolved by negotiation, it may be necessary to take formal action. The table below provides details of the number of notices served by financial year:

Notice Served	2013/14	2014/15	2015/16	2016/17	2017/18
Enforcement Notice	4	13	15	8	6
Breach of Condition Notice	3	1	1	0	0
Planning Contravention Notice	11	14	21	12	9
Section 215 notice (untidy land)	1	0	0	0	1
Temporary Stop Notice	0	0	0	0	3
Stop Notice	0	0	0	0	2
Total	19	28	37	20	21

- 4.24. The Planning Enforcement Code of Practice sets out the procedures that will be followed in investigating complaints about alleged breaches, including setting timescales when an officer will visit the site. These timescales vary depending on whether the complaint will be treated as the 'Highest Priority', 'Medium Priority' or 'Lowest Priority', as set out in the Code of Practice which is available as a background paper. For complaints falling in to the Highest Priority, the aim is to visit the site the next working day after receipt of the complaint, in the case of all other complaints, the aim is to visit the site within five working days. Examples of complaints falling into the highest category include the demolition of a building which it is essential to retain, work to or felling of a protected tree and unauthorised work which causes immediate harm to the locality, e.g. Site of Special Scientific Interest (SSSI), Conservation Area or likely to result in significant harm to amenity. In such circumstances, the site needs to be visited promptly to avoid irreparable harm. Enforcement complaints are categorised depending on the nature of the alleged breach, e.g. advertisements, building operations, work to trees etc. For the period 1 April 2017 to 31 March 2018, on average, in 86% of cases an initial site visit was undertaken within the target time. Some sites may need to be revisited, depending on the nature of the alleged breach, for example, to undertake further monitoring.
- 4.25. It is apparent that in many cases, there is an expectation from those reporting alleged breaches of planning control that action will be taken to cease the activity or development being undertaken immediately and/or that the perpetrator has broken the law and the development is illegal. To reiterate, development undertaken without the relevant consent is unauthorised, not illegal. Only where the development is having a significant and serious impact on residents or the environment or the activity would cause irreparable damage would it be considered necessary to serve a temporary stop notice or stop notice.
- 4.26. It is important to emphasise that the Borough Council does not condone the actions of individuals or developers who breach planning controls. Where, during an investigation, it is established that a breach of control has occurred,

the owner of the property/developer will be advised to cease work whilst the investigation continues and the appropriate course of action is determined. If they choose to continue with the development, they do so at their own risk and may incur unnecessary and potentially significant costs if permission is not granted.

- 4.27. When investigating an alleged breach of planning control, it is important to follow the procedures carefully, particularly to ensure that any subsequent action succeeds. This may also involve monitoring the situation over a period of time to determine if a breach has occurred and to collect evidence to support any action. Where it has been determined that a breach has occurred and it is expedient to take formal action, it will be necessary to serve a Planning Contravention Notice to collect information to clearly inform the contents and requirements of any formal notice, for example, the nature of the breach and the person(s) who own or have an interest in the land. Land registry information is also used to confirm ownership of land.
- 4.28. When a notice has been issued, the recipient(s) of the notice may, where the right exists, choose to submit an appeal before the notice takes effect. This may result in further delays in resolving the breach of planning control while appeal is processed, this delay can potentially be significant depending on which process the appeal is to be determined under, i.e. written representations, Hearing or Inquiry. If the Council is ultimately successful in defending such an appeal and the notice is upheld, it would only then become effective and the time for compliance commences on the date of the appeal decision. It is also important to recognise that, where an offence occurs for failure to comply with a notice, the Borough Council must then determine if it would be in the public interest to pursue legal action against the person(s) failing to comply with the notice. Any subsequent legal action may potentially result in a fine, or even a custodial sentence, but this will not necessarily result in the breach of planning being resolved. This illustrates how the process and rights of the perpetrator can be exploited, resulting in delays, sometimes significant, in resolving a breach.

Examples of Successful Enforcement Action by Rushcliffe's Planning Service

- 4.29. In the majority of cases where a breach has occurred, the breach may have been resolved through discussion/negotiation resulting in the removal of the unauthorised work/structure or cessation of the use, or an application may have been submitted and subsequently approved regularising the unauthorised development, including the imposition of conditions to address/mitigate any potentially harmful impacts. In some circumstances, even where a breach had been identified, it may not have been deemed expedient or in the public interest to take further action or insist on the submission of an application. In these instances, the development/activity would remain unauthorised.
- 4.30. In a number of cases, the planning team have taken action successfully to remedy a breach of planning control and/or address unacceptable impacts of development or activities. Examples include where a temporary stop notice

was served on the developers of the land to the south of Wilford Lane (north of the Arena site) to cease piling operations which were causing noise and vibration and were proving to be a nuisance to nearby residents. A condition of the planning permission for the site required the submission of a construction method statement, including measures to minimise the impact of noise, dust, vibration etc. The developer commenced work on site, including piling operations, before this condition had been formally discharged. Despite requests from officers to cease these activities until such time that the requirements of the condition had been satisfied, work continued on site. Therefore, a decision was taken to serve a temporary stop notice and the activities ceased immediately upon service of the notice. The condition was subsequently discharged and, although it is accepted that piling is an inherently noisy activity, measures were secured to minimise the impacts of the activities on nearby properties. Furthermore, officers facilitated discussions between the developers and nearby schools to cease activities during the exam period, which might have otherwise caused disturbance to students sitting their exams.

- 4.31. The service of temporary stop notices appears to be rare, this was believed to be the first time that the Borough Council had ever served such a notice. Discussions with neighbouring authorities in Nottinghamshire has revealed that many of them have never served a temporary stop notice or stop notice. Since serving the notice on the land south of Wilford Lane, a further two temporary stop notices and to stop notices have been served in respect of a gypsy site at Flintham Lane, Screveton. As referred to in Paragraph 4.15 above, these notices should not be used lightly and only when it is considered necessary to prohibit what is essential to safeguard amenity or public safety in the neighbourhood; or to prevent serious or irreversible harm to the environment in the surrounding area. There are also Human Rights issues to consider and, therefore, taking rapid action to address breaches of planning control must be justified and there must be a clear public interest in doing so
- 4.32. In another instance, a Listed Building Enforcement Notice was served in respect of Park Lodge, Central Avenue, West Bridgford. The building was considered to be a curtilage listed structure to Bridgford Hall and work had been undertaken to 'clean' the brickwork on the building. Unfortunately the method of cleaning, sand blasting, caused significant damage to the face of the brickwork, in the majority of bricks removing totally the face of the brick leaving the brickwork exposed to the elements and a threat of further deterioration to the building. The Listed Building Enforcement Notice required work to be carried out to repair the face of the brickwork and the pointing and tinting and sealing of the brickwork to in an appearance that reflected the original appearance of the brickwork and character of the building. Alongside the service of the notice, investigations were undertaken to ascertain who was 'responsible' for the work in the event that it became necessary to take legal action for damage to a curtilage listed building. The work as ultimately carried out in accordance with the requirements of the enforcement notice and it was not necessary to pursue legal action.

4.33. In the majority of cases, and in accordance with government guidance, resolution of breaches will first be sought through discussions with the parties involved. The following are just a few examples where investigations have been concluded successfully without the need to take formal action:

- An unauthorised first floor window was installed in the rear elevation of a property, which was not in accordance with approved plans. The window was required for means of escape to comply with Building Regulations. It was also noted during the officer's site visit that the extensions and alterations approved under the previous permission had not been built in accordance with approved plans. The officer liaised with the owner of the property and they agreed to submit a planning application for the development as built, it was then possible to impose conditions relating to the window specifying that it remains fully closed except for in an emergency and also that it be obscure glazed.
- Unauthorised replacement windows installed and alterations carried out to a Listed Building. Following a site visit by the Enforcement Officer and the Conservation Officer, it was agreed with the owners that improvement works be carried out to the Listed Building in mitigation of the harm caused by the replacement windows. An application for Listed Building Consent was submitted and the improvement works have been largely completed.
- A clear glazed window was installed in a first floor side elevation of a block of apartments. Following discussions with the neighbour, owner and agent, the owner agreed to obscure glaze the window and therefore reduce the harm to neighbouring amenity. There was no need for notices to be issued and although the window remains unauthorised, as apartments do not have the benefit of permitted development rights it would not be expedient to pursue now that the window is obscure glazed.
- A complaint was received from a Councillor regarding the display of two large signs on a site. The company responsible for the erection of the adverts was contacted by the Enforcement Officer and agreed to remove the larger of the signs. It was not considered expedient to pursue the smaller sign as it only exceeded Deemed Consent by 0.2msq

5. Risks and Uncertainties

5.1. Failure to deliver an effective planning enforcement service and to respond promptly to complaints regarding alleged breaches of planning control can impact on public confidence in the planning service as well as the reputation of the service and the Council as a whole.

6. Implications

6.1. Financial Implications

Where enforcement action is taken without justification or such action cannot be robustly defended, there may be a risk of an award of costs in the event of an appeal or claims for compensation, principally in connection with the service of a Stop Notice. It is not possible to provide an estimate of such costs as these will vary from case to case and will depend on the factors impacted by any action, e.g. cost of plant and machinery, lost earnings, cost of expert witnesses to defend appeals etc.

6.2. Legal Implications

The provisions of the European Convention on Human Rights, such as Article 1 of the First Protocol, Article 8 and Article 14, are relevant. In some instances there is a clear public interest in taking rapid action to address breaches of planning control. To ensure a proportionate approach is taken, particularly before serving a temporary stop notice or a stop notice, the local planning authority must be satisfied that there has been a breach of planning control and that the activity which amounts to the breach must be remedied or, in the case of a stop notice, stopped immediately and before the end of the period allowed for compliance with the related enforcement notice.

6.3. Equalities Implications

The Council is committed to delivering all enforcement activities in accordance with its Equality and Diversity Policy and will embed the principles of that policy in its approach to its enforcement and regulatory functions. Therefore, the Council will treat all people equally and fairly, irrespective of their nationality, political views, race, gender, disability, age, religion, or sexual orientation.

6.4. Section 17 of the Crime and Disorder Act 1998 Implications

Whilst there may be community safety implications associated with the delivery of the enforcement function, there are not considered to be any such implications associated with the recommendation and consideration of this report.

6.5. Other implications

There are no other implications.

7. Link to Corporate Priorities

The operation and delivery of an effective enforcement function and timely resolution of breaches of planning control or appropriate action links with the

corporate priorities by ensuring the delivery of appropriate economic growth to ensure a sustainable, prosperous and thriving local economy and contributes to maintaining and enhancing residents' quality of life by protecting their amenities from the unacceptable impacts of development. The delivery of an efficient and effective planning enforcement service is consistent with the Council's corporate priority to transform the Council to enable the delivery of efficient high quality services.

8. Recommendations

It is RECOMMENDED that The Board consider, make comment on and endorse the work and performance of the Enforcement team as outlined in this report and the accompanying presentation.

For more information contact:	Andrew Pegram Service Manager – Communities 0115 914 8598 apegram@rushcliffe.gov.uk
Background papers available for Inspection:	Rushcliffe Borough Council's Planning Enforcement Code of Practice. This document is available on the Council's website at: https://www.rushcliffe.gov.uk/planningandgrowth/enforcement/
List of appendices:	None.