



Growth and Development Scrutiny Group

Tuesday, 25 August 2020

Planning Enforcement – Part One

Report of the Executive Manager – Communities

1. Purpose of report

- 1.1. The Borough Council is in the process of preparing a Planning Enforcement Policy. In addition, the Planning Enforcement Code of Practice is due for review and renewal in March 2021. This report, and the presentation by officers, will provide an understanding of how the enforcement regime is governed by regulations and how this part of the Planning Service is delivered by the Borough Council.
- 1.2. Scrutinising the emerging policy, and its effectiveness, as well as changes in legislation and operational practice will provide Councillors with an understanding of the process and provides an opportunity for them to influence changes to the Policy prior to adoption by Council by March 2021.
- 1.3. The delivery of the Planning Enforcement function was previously the subject of a report to the Performance Management Board in September 2018. The Board noted the report. The main actions arising were:
 - the provision of additional information regarding the legal implications of making planning enforcement enquiries public information
 - the Planning Enforcement workshop and information regarding the revised NPPF to be delivered to current councillors and also be included in the induction programme following the local election in 2019.

2. Recommendation

It is RECOMMENDED that the Growth and Development Scrutiny Group:

- a) identifies potential amendments to the policy and areas for further investigation by officers
- b) asks for a further draft of the policy to be brought back for consideration by the Group on 14 October 2020.

3. Reasons for Recommendation

- 3.1. The Council's Corporate Strategy 2019-2023 was adopted in September 2019. The Strategy includes a new corporate priority of 'The Environment'. The enforcement of planning controls is an important aspect of protecting the natural, built and historic environment. Furthermore, there is a need for the

policy to set out clearly for all residents and businesses, including those who may be undertaking development, to understand clearly the approach the Council will take when investigating alleged breaches of planning control.

4. Supporting Information

- 4.1. The current Corporate Enforcement Policy was adopted in March 2010 and was last revised in October 2019. 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:
- street cleansing
 - 'enviro' crime – fly tipping, graffiti, litter, abandoned vehicles
 - environmental health – food safety, health and safety, private sector housing, environmental protection, statutory nuisance, dogs
 - licensing
 - building control
 - planning and development control (now referred to as Planning and Growth)
 - benefit fraud.
- 4.2. The purpose of the umbrella policy is to provide guidance to, amongst others, the officers within the Council responsible for enforcement of regulations. Within the specific areas detailed above, other policies may apply. In the case of planning enforcement, an enforcement code of practice exists and the intention is to now adopt a policy document.
- 4.3. The primary purpose of enforcement is to protect the public and individuals. 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.
- 4.4. Unlike the determination of planning applications, which is a statutory function, the enforcement of planning control is discretionary. However, it is acknowledged that the effectiveness of the enforcement function can impact on the reputation of, and public confidence in the planning service and this is highlighted in paragraph 58 of the National Planning Policy Framework which states; *“Effective enforcement is important to maintain public confidence in the planning system.”* This paragraph also highlights that *“Enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breaches of planning control.”*
- 4.5. 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, officers must first consider if the matter amounts to development.

- 4.6. 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 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.
- 4.7. 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 commence enforcement if no action is taken within:
- 4 years of substantial completion (for a breach of planning control consisting of operational development)
 - 4 years for an unauthorised change of use to a single dwellinghouse
 - 10 years for any other breach of planning control.
- 4.8. Exceptions to these time limits apply where there has been deliberate concealment of a planning breach, although cases such as this are relatively rare.

Approach to investigations and available tools

- 4.9. There are a range of ways to tackle alleged breaches of planning control. 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.
- 4.10. 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 applied to impose restrictions on the development to avoid adverse impacts.
- 4.11. 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 and the fact that the development has already taken place should not be a consideration. 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.

- 4.12. 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.
- 4.13. 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.
- 4.14. 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 for compliance with the steps. 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, a failure to comply with the requirements of the notice shall constitute an offence in respect of which the Council may consider prosecution.
- 4.15. 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.
- 4.16. Temporary Stop Notice – temporary stop notices are a powerful enforcement tool that allows local planning authorities to act 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.

- 4.17. 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.
- 4.18. 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.
- 4.19. 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.
- 4.20. 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.
- 4.21. 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.

4.22. 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

4.23. It is important to recognise that enforcing planning controls is more than responding to, for example, complaints from residents about development taking place potentially without planning permission or failure to comply with conditions/build in accordance with approved plans. The core element of enforcement investigations is undertaken by 2 dedicated members of staff who are line managed by a Principal Planning Officer as part of their team, which also includes the Conservation Officer, Contributions Officer and two planning technicians. The Principal Planning Officer also carries a caseload of planning applications and oversees the determination of applications in the West Bridgford area.

4.24. In addition to responding to complaints from residents, the enforcement of planning controls is supported by the planning officers within the team who are available to provide guidance to the enforcement officers. In addition, the planning officers deal with applications to discharge conditions of planning permission, which is also considered to be part of the process of enforcing the requirements of planning permission.

4.25. A comparison with other authorities in Nottinghamshire is provided in the table below:

Authority	Number of complaints received 2019/20	Number of dedicated enforcement staff (fte)
Ashfield District Council	149	2
Bassetlaw District Council	180	1
Broxtowe Borough Council	395	2
Gedling Borough Council	228	1
Mansfield District Council	252	1
Newark and Sherwood DC	470	2
Nottingham City Council	166	1
Rushcliffe Borough Council	235	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

- 4.26. The enforcement function has been largely 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 significant 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 etc. The table below sets out the number of investigation complaints received in each financial year from 2013/14 to 2019/20.

	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Number of enquiries received	368	333	381	307	281	235

- 4.27. 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 of the complaints closed during the period (nearly 50%) were found to be unfounded, the situation was similar in 2019/20. 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	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Enforcement Notice	13	15	8	6	1	7
Breach of Condition Notice	1	1	0	0	0	0
Planning Contravention Notice	14	21	12	9	8	12
Section 215 notice (untidy land)	0	0	0	1	0	0
Temporary Stop Notice	0	0	0	3	0	1
Stop Notice	0	0	0	2	1	0
Total	28	37	20	21	10	20

- 4.28. 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 5 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. In general, the majority of sites are visited within target time and the performance indicator for this activity (80% of visits within target time) is normally exceeded. For the period 1 April 2019 to 31 March 2020, on average, in 75.85% of cases an initial site visit was undertaken within the target time. The timescales for undertaking site visits during this period was impacted by the long term absence of one of the Enforcement Officers and the Covid Pandemic. Where appropriate sites may be revisited, depending on the nature of the alleged breach, for example, to undertake further monitoring.

- 4.29. Whilst it is accepted that there is an expectation that action will be taken in respect of alleged breaches of planning control to cease the activity or development being undertaken immediately and/or that the perpetrator has broken the law and the development is illegal; 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 expedient to serve a notice to bring about an immediate cessation of the work/use.
- 4.30. 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 subsequently refused.
- 4.31. 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.
- 4.32. 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.

The Draft Enforcement Policy

- 4.33. The National Planning Practice Guidance advises that; *“The preparation and adoption of a local enforcement plan is important because it:*
- *allows engagement in the process of defining objectives and priorities which are tailored to local circumstances;*
 - *sets out the priorities for enforcement action, which will inform decisions about when to take enforcement action;*
 - *provides greater transparency and accountability about how the local planning authority will decide if it is expedient to exercise its discretionary powers;*
 - *provides greater certainty for all parties engaged in the development process.”*
- 4.34. The draft Enforcement Policy has been prepared (see Appendix One) having regard to the national guidance and is also reflective of the current practices and procedures engaged in the investigation of allegations of a breach in planning control. The Enforcement function remains largely reactive and this is reflective of the number of planning applications dealt with each year, the amount of development taking place within the Borough and the resources available for this (non-statutory) element of the planning service. However, procedures are in place to undertake reactive involvement in larger developments (50 dwellings plus) to ensure that conditions are complied with and obligations within Section 106 agreements discharged. The monitoring of Section 106 agreements and Community Infrastructure Payments now sits with a dedicated officer, in addition to the Enforcement Officers. In exceptional circumstances surveillance may be considered to investigate an alleged breach, in these circumstances the RIPA policy will apply [<https://www.rushcliffe.gov.uk/aboutus/aboutthecouncil/documentsstrategiesandpolicies/>].
- 4.35. It is acknowledged development which is carried out without the relevant permission can cause frustration and become very emotive. There may be a lack of understanding of the planning process amongst residents and the instant

belief that the actions of somebody building something without the relevant consent or failing to comply with a condition is illegal. In the majority of cases such actions will be unauthorised and an offence is only committed when there is a failure to comply with a formal notice, such as an enforcement notice or breach of condition notice. Exceptions to this general rule include causing damage to/demolishing a listed building, displaying an advertisement without consent or causing wilful damage/cutting down a tree the subject of a tree preservation order.

- 4.36. There is often an expectation/perception that if unauthorised works are taking place, the Council can immediately stop work on a site. As set out above, this may only be possible in limited circumstances. Temporary stop notice/stop notices are unlikely to be considered a proportionate response to the breach and are a tool used in exceptional cases. Those carrying out unauthorised development are advised to stop work but ultimately, any work they have carried out or continue to carry out without the relevant permission is at their own risk. In some cases, particularly where there is a need to monitor an activity, e.g. an alleged business activity operating from a residential property, there may be a need for ongoing monitoring and collection of evidence, and the conclusion of any investigation can potentially be protracted.
- 4.37. The policy should set expectations that have regard to the constraints of the legislative framework and available resources. The draft policy explains the process that will be followed in any investigation and confirms that every effort will be made to resolve the alleged breach through negotiation, only resorting to formal action where this is necessary, and in accordance with national guidance. It should also be recognised that this policy will be available to and read by everybody, including those who may wish to report an alleged breach and those who may be responsible for a breach. The policy therefore needs to strike the right balance to demonstrate the Council's approach to enforcement of planning control whilst managing the expectations of the general public and those who may have complained about an alleged breach of control.

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 and the reputation of the service and the council as a whole.
- 5.2. It is also important to ensure that the Policy is measured according to the constraints and requirements of the legislative framework and resources available to the Council. Setting false/undeliverable expectations could create negative reputational issues and lack of confidence in the planning process generally.

6. Implications

6.1. Financial Implications

6.1.1. The cost of the dedicated officers responsible for undertaking enforcement work and any additional costs such as court costs are contained within current budgets.

6.1.2. 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

6.2.1. Enforcement action must be taken in accordance with the relevant legislation. Action must be proportionate and in the public interest. 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

6.3.1. 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.

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

6.4.1. 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.

7. Link to Corporate Priorities

Quality of Life	Unauthorised development may give rise to impacts which may adversely affect the amenities and quality of life of residents which can be resolved by taking appropriate enforcement action where this is justified or in seeking to regularise unauthorised development through a retrospective
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	planning application and the imposition of conditions which can mitigate the impact of development.
Efficient Services	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.
Sustainable Growth	Sustainable development can be delivered through the preparation of development plan documents and the application of policies within the NPPF. The operation of an effective enforcement service can ensure that development is compliant with national and local planning policies and is therefore sustainable.
The Environment	Unauthorised development may give rise to impacts which may adversely affect the natural and built environment, impacts which can be resolved by taking appropriate enforcement action where this is justified or in seeking to regularise unauthorised development through a retrospective planning application and the imposition of conditions which can mitigate the impact of development.

8. Recommendations

It is RECOMMENDED that the Growth and Development Scrutiny Group:

- a) identifies potential amendments to the policy and areas for further investigation by officers
- b) asks for a further draft of the policy to be brought back for consideration by the Group on 14 October 2020.

For more information contact:	Andrew Pegram Service Manager - Communities 0115 914 8598 apegram@rushcliffe.gov.uk
Background papers available for Inspection:	<i>The Corporate Enforcement Policy and the Rushcliffe Borough Council's Planning Enforcement Code of Practice. These documents are available on the Council's website at: https://www.rushcliffe.gov.uk/aboutus/aboutthecouncil/ (Corporate Enforcement Policy is available under the heading Documents, policies and strategies) and https://www.rushcliffe.gov.uk/planningandgrowth/enforcement/</i>
List of appendices:	Appendix 1 - Draft Enforcement Policy