

EAST AYRSHIRE COUNCIL
NORTHERN AREA LOCAL COMMITTEE

28 OCTOBER 2005

PLANNING ENFORCEMENT AND NON-COMPLIANCE WITH NOTICES

Report by the Head of Planning, Development and Building Standards

1. PURPOSE OF REPORT

1.1 The purpose of this report is to provide the Local Committee with information as requested in relation to Planning Enforcement Procedures and issues arising from any subsequent non-compliance.

2. THE PURPOSE OF ENFORCEMENT ACTION

2.1 Planning Advice Note 54, "Enforcement", confirms that the key objectives of enforcement are:-

- A] To remedy undesirable effects of unauthorised development, and
- B] To bring unauthorised activity under control.

2.2 Unless these objectives are secured, the credibility of the planning system will be undermined. PAN 54 does recognise that negotiation can result in a remedy; however this needs to be balanced against the impacts arising from the breach.

3. ENFORCEMENT NOTICES

3.1 Planning Authorities will frequently, through the prior service of a Planning Contravention Notice, seek to confirm that they are in contact with the appropriate individuals and have all other necessary information about the activities on site so as to weigh up the need for actual enforcement action. Thereafter, the most commonly used Enforcement Notices are **Breach of Condition Notices** and **Operational Development Enforcement Notices**.

3.2 A Breach of Conditions Notice, (BCN), may be served on the developer **or** the owner of the land **or** both, when it comes to the Council's attention that Conditions attached to a Planning Permission have been breached. Commonly these are suspensive conditions, e.g. "submit details of landscaping for the approval of the Planning Authority prior to the

commencement of development and implement the approved scheme during the first appropriate planting season”.

3.3 Where non-compliance with the terms of a planning condition has been observed, the developer will typically be requested to comply with the breached condition within a time scale, say 14 days, by submission of the details required by the condition. If there is no submission of the required details, then a Breach of Condition Notice may be served. The service of any enforcement notice is a discretionary power having regard to the provisions of the Development Plan and any other material considerations. However, because of the environmental impact and distress that may result from any failure to discharge a condition; eg. for neighbours, and because conditions will only have been applied to a planning permission out of necessity, the Division consequently will be likely to pursue a breach through service of a BCN.

3.4 The Notice takes effect immediately and may not be appealed to the Scottish Ministers, but a minimum of 28 days must be allowed for compliance with its terms. The Council may not take any direct action to resolve the breach; eg. may not itself construct a fence required by condition and thereafter seek reimbursement from the developers.

3.5 Failure to comply with the terms of the Breach of Condition Notice within the time scale allowed is a criminal offence that can be referred to the Procurator Fiscal.

3.6 Unlike with “operational development enforcement notices”, a Breach of Condition Notice may not be accompanied by service of a Stop Notice.

3.7 An Operational Development Notice is served on the owner of the land and other persons with a material interest in that land where there has taken place development which does not have the benefit of Planning Permission and where that development is considered unacceptable. In that it is the intention of enforcement action to address the impacts of unauthorised development that are unacceptable, eg in terms of visual or residential amenity, it is not the purpose of enforcement action to simply pursue development that may in all other respects be acceptable. Enforcement action is not undertaken to “regularise a situation”. Having said that, Enforcement Officers will pursue even acceptable unauthorised development to the extent of seeking submission of an application and advising developers that it is in their best interests to have available all the necessary permissions, in case they subsequently wish to sell the property.

3.8 An Operational Development Notice, (ODN), may ultimately require the removal of the unauthorised development. However in the first instance, the Notice does not take effect for a minimum of 28 days following its service, during which period an appeal may be made to the Scottish Ministers. Such an appeal is determined by a Reporter appointed by the Scottish Executive Inquiry Reporters Unit based in Falkirk.

3.9 If an appeal is lodged, that enforcement action cannot be taken further until the appeal is determined. The determination of an appeal is likely to take 3 or 4 months. The Reporter may, in addition to granting or refusing the appeal, vary the terms of the Notice including the time scale for compliance.

3.10 Following the 28 days during which the Notice may be appealed a reasonable period must thereafter be allowed for compliance with the Notice's terms. The reasonableness of that period can be one of a range of grounds of appeal against the notice, another prominent one being that the development ought to be granted.

3.11 Failure to comply with the terms of an Operational Development Notice within the period allowed, (not the unauthorised development itself), is a criminal offence that can be referred to the Procurator Fiscal.

3.12 In the case of Listed Buildings unauthorised work is a criminal offence but the Procurator Fiscal may not proceed if he is not satisfied that the Planning Authority have used all of the avenues open to them.

4. STOP NOTICE

4.1 An ODN may be accompanied by a **STOP NOTICE** requiring that an activity contained in the enforcement notice be stopped. It should only be served where it is considered that there is serious harm, injury or risk to the public interest.

4.2 A Stop Notice normally takes effect 3 days after its service, following which the activity must stop. However if the Planning Authority provide a reason for it to take immediate effect, it can be served so as to stop the activity immediately.

4.3 A Stop Notice effectively suspends the operation of the associated enforcement notice in the sense that it requires cessation of the activity referred to in the enforcement notice notwithstanding the usual 28 day period for that notice to take effect. Once the period for complying with the enforcement notice has expired, any breach of the terms of that notice would in itself be an offence and therefore this is when the Stop Notice ceases to have effect.

4.4 There is no appeal against the service of a Stop Notice. It is a criminal offence not to comply with the Stop Notice and PAN 54 indicates that to reinforce the seriousness of any breach of a Stop Notice, the Planning Authority should always consider prosecution when they have evidence of an offence. In these circumstances a report is prepared for and submitted to the Procurator Fiscal. It is, though, the experience of the Planning Division that after reporting the circumstances of a case to the Procurator Fiscal it may take several months to bring it to court and many more for the case to be concluded. Furthermore, the Procurator Fiscal alone will decide if it is in the public interest to prosecute.

4.5 PAN 54 encourages good communications between the Planning Authority and the Fiscal as a means of facilitating joint working towards resolution of planning breaches. However, in a recent case, the Fiscal has informed that he is taking no proceedings where the Division consider that the breach is clear and merits prosecution. After requesting that the matter be reconsidered, the same decision was given. No explanation was offered other than prosecution is “not in the public interest”. PAN 54 suggests that there is evidence that Fiscals will be more willing to prosecute cases if all other possible avenues of action have been explored first. It is possible that in this example, the Fiscal may have considered that the opportunities for direct action by the Council could have been further explored.

5. INTERIM INTERDICT

5.1 Interim Interdicts have also been used by the Planning Authority to bring an activity to a stop. This is a civil process rather than a criminal one. An interdict is sought from the Sheriff Court or the Court of Session to prevent the activity from continuing. If granted, the Interdict is served by Sheriff’s Officers and takes immediate effect. Should a developer breach the terms of the Interdict, this is considered to be a Contempt of Court which may result in a fine.

6. CONCLUSIONS

6.1 From the above it is clear that there are a range of enforcement and related options available to the Authority to address unauthorised development activity. Officers will pursue resolution of breaches in the first instance through negotiation and in many cases acceptable outcomes are achieved; however this may not always be appropriate given the severity and impact of the breach. In these cases the need for early enforcement intervention is fully recognised. The credibility of the planning system rests on the effectiveness of the enforcement process but however strongly the Authority pursues a breach it is ultimately the case that criminal proceedings will be instigated by another agency quite properly having its own procedures and priorities which may not always mesh with those of the Planning Authority.

6.2 There have been notable successes in terms of working through the Procurator Fiscal to secure resolution of enforcement breaches. There have been more frequent successes achieved by officers through negotiation and thereafter through service of enforcement notices. The Division will continue to work with related agencies to bring about appropriate resolution of breaches at as early an opportunity as possible.

7. RECOMMENDATION

7.1 It is recommended that the Committee note the contents of the report.

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Head of Planning, Development and Building Standards**

04 October 2005 (DVM/SA)
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LIST OF BACKGROUND PAPERS

1. Planning Advice Note 54, "Enforcement"

Anyone wishing to inspect the above paper should please contact Dave Morris, Development Promotion Manager, on 01563 576753.

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