

## EAST AYRSHIRE COUNCIL

### DEVELOPMENT SERVICES COMMITTEE 28 AUGUST 2001

#### THE ENFORCEMENT OF PLANNING

#### Report by Director of Development Services

### 1 PURPOSE OF REPORT

1.1 The purpose of the report is to present to the Committee a review of the operation of the Planning Enforcement process and to secure agreement to same.

### 2 STATUTORY BACKGROUND

2.1 The statutory basis for enforcement action is contained within the Town and Country Planning (Scotland) Act 1997 wherein it states, (Section 127), that *“the planning authority may issue a notice where it appears to them –*

*A] that there has been a breach of planning control, and*

*B] that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations”.*

2.2 Further guidance on the taking of enforcement action can be found in National Planning Policy Guideline 1, “The Planning System”, Planning Advice Note 54, “Planning Enforcement” and Circular 4/1999, “Planning Enforcement”. It is important to consider the content of these documents when establishing the role of enforcement in the planning process. PAN 54 states a planning authority’s enforcement powers are discretionary and that the two key objectives of enforcement are:

- To remedy the undesirable effects of unauthorised development
- To bring unauthorised activity under control

2.3 In deciding whether to issue a notice, the planning authority must act in accordance with the provisions of the development plan unless material considerations indicate otherwise.

2.4 NPPG 1 states that:-

*“before considering enforcement action, planning authorities should consider whether the breach of planning control would unacceptably affect public amenity or the use of land or buildings meriting protection of planning control to which it relates. While it is for the local authority to decide what action is necessary when there is a breach of planning control, failure to take appropriate action could result in finding a maladministration by the Ombudsman.”*

2.5 PAN 54 reiterates that in terms of good practice, planning authorities should:-

- *Consider whether the breach unacceptably harms public amenity, or the existing use of land and buildings merits protection in the public interest;*
- *Ensure any enforcement action is commensurate with the breach of planning control to which it relates;*
- *Ensure that should an initial attempt to persuade an owner or occupier of a site to remedy voluntarily the harmful effects of unauthorised development fail, 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.*

2.6 Significantly, whilst urging planning authorities to take measured enforcement action commensurate with the effects of the breach and not to allow unreasonable delays in negotiations to delay enforcement, both Circular 4/1999 and PAN 54 state:-

*While it is clearly unsatisfactory that anyone should carry out development requiring planning permission without submitting an application and paying a fee, serving an enforcement notice to regularise development is not necessarily the correct route. Where such development is acceptable, service of a Planning Contravention Notice, ((PCN), is intended to encourage submission of a planning application, whereas service of an enforcement notice would not only be considered unreasonable but might also lead to an award of expenses against the authority in the event of an appeal.*

2.7 The Circular further states that:-

*“it could be regarded as unreasonable for the planning authority to issue an enforcement notice solely to remedy the absence of a valid planning permission, if it is concluded, on an enforcement appeal to the Secretary of State (now Scottish Ministers), that there is no significant planning objection to the breach of control alleged in the enforcement notice. Planning authorities who issue a notice in these circumstances run the risk of an award against them of the appellant’s costs in the enforcement appeal.”*

The question of costs would clearly be an important issue to evaluate when considering enforcement action.

2.8 An individual served with an enforcement notice has, in most circumstances, the right of appeal to the Scottish Ministers. Two of the available grounds of appeal include:-

*a] that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;*

Any appeal will require to be accompanied by a fee equivalent to that which would have been required had a planning application been submitted. This is because the appeal amounts to an application for deemed planning consent. That fee is paid both to the

Scottish Ministers and to the planning authority. If the fee is not paid, the Reporter will not consider the possibility of granting consent and an appeal on this ground would fail.

*b] that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.*

It is proper for the planning authority to seek to remedy a breach of planning control but the requirements of the notice should not exceed the “injury” arising from the breach. It is also appropriate for an authority to “under enforce”, eg to concede that a part of a breach would be acceptable and rather than pursue enforcement action in that regard, focus the notice on that activity whose impacts are not acceptable.

2.9 In some cases the injury arising from a breach may be so severe that a planning authority will consider service of a Stop Notice. This must be served only in association with an enforcement notice and can relate only to matters contained in the enforcement notice. Whilst ordinarily an appeal against an enforcement notice suspends the operation of that notice, a stop notice may prohibit the carrying out of the activity within the scope of the enforcement notice until such time as that notice comes into effect. (Thereafter the enforcement notice will prohibit the activity).

2.10 Partly because there is no right of appeal against a stop notice and it can only be challenged legally, concerns arise regarding compensation that might be payable in the event of a legal challenge succeeding. Compensation could arise where:-

- *the associated enforcement notice is quashed on appeal on grounds other than that planning consent should be granted*
- *the enforcement notice is varied on appeal so as to exclude the activity subject of the stop notice*
- *the enforcement notice is withdrawn by the planning authority*
- *the stop notice itself if withdrawn*

Compensation will not arise where the activity prohibited by a stop notice was a breach of planning control at any time when the notice was in force.

2.11 Notwithstanding the above, the general thrust of government guidance is that authorities should seek an application where planning consent is required but only serve an actual enforcement notice where there is an undesirable effect resulting from that unauthorised development. Service of an enforcement notice where the unauthorised development is acceptable and where there is no adverse effect on public amenity or on the public interest would be inconsistent with government advice.

### **3 PLANNING ENFORCEMENT IN EAST AYRSHIRE**

3.1 The Planning and Building Control Division recognises that an effective enforcement system underpins the credibility of the planning process. Whilst not all breaches are deliberate, in the interests of fairness, all development requiring consent will be pursued for the submission of the relevant application. The misguided or inappropriate actions of the few should not spoil the amenities or environment we enjoy.

3.2 The enforcement process is operated with regard not only to government Circulars, Guidance and Advice but also in accordance with procedures adopted in-house to secure consistency through time and between the Kilmarnock and Lugar offices. The Planning and Building Control Division investigated 1280 complaints in the 5 years to April 2001 and has served 61 Enforcement Notices and 56 Planning Contravention Notices.

3.3 The Planning and Building Control Division will investigate all complaints alleging a breach of planning control, other than those submitted anonymously. (Anonymous complaints will be investigated dependent upon other staff commitments and upon the severity of the breach alleged). Additionally, planning officers will identify potential breaches during the course of their duties which will similarly be pursued.

3.4 It is the policy of the Division to rectify breaches in the first instance through negotiation and by seeking applications where consent is required. This allows for the merits of development to be assessed locally whereas enforcement action resulting in an appeal would place decision-making with the Scottish Ministers. Should a breach be of such significance as to require immediate resolution, the emphasis on negotiation will be reduced or indeed formal enforcement action will be initiated straight away. It is the experience of the Division that negotiation is generally an effective means by which to safeguard the environment and amenity of the area. This approach has been advised within the periodic analyses of Development Promotion activity as presented to Development Services Committee.

3.5 The Division is aware that there remains an issue with regard to development being commenced in advance of the necessary consents being obtained. In many cases this will have arisen out of ignorance of the planning system; in some cases that explanation is not available. Nevertheless, government guidance confirms that enforcement notices should not be issued solely to "regularise" unauthorised development which is acceptable on its planning merits. It states this would be unreasonable and may risk an award of costs to the appellant. It is not considered that there has been any significant long term detriment to the amenity of East Ayrshire resulting from the established approach to enforcement in East Ayrshire.

3.6 It is proposed therefore that the following procedural guidance should be adopted.

## Enforcement Guidance

- a) All breaches will be pursued for required consents even where the development is acceptable.
- b) A Planning Contravention Notice will accompany our first letter to any individual; thereby seeking at the earliest possible date all necessary information for the proper service of an enforcement notice, if required.
- c) If there is no application or remedial action within 21 days of our first letter, an enforcement notice will be issued if it is expedient in terms of the development plan and other material considerations or to remedy an unacceptable effect on amenity or public interest.
- d) Where an application is submitted, for example further to a request for same from the Division, enforcement action will not be initiated pending determination of the application. However, if the impacts of the unauthorised development are such as to unacceptably affect public amenity or interest, then the presence of the application would not inhibit the taking of enforcement action.
- e) Where an application is being sought for an unauthorised development, delays on behalf of the developer in submitting an application should not delay enforcement action if the development is generating unacceptable adverse impacts.
- f) Where an application is received after service of an enforcement notice, that notice would not be withdrawn until the application is determined.

## **4. LEGAL IMPLICATIONS**

4.1 Enforcement is delegated to the Head of Planning and Building Control under the Council's Scheme of Delegation and this report usefully defines the guidance proposed in operating these delegated powers for approval by members.

## **5. CONCLUSIONS**

5.1 It is considered that the procedures outlined above comply with government legislation and guidance and offer a sound basis for remedying the undesirable effects of unauthorised development. As is stated by Circular 4/1999, *"public respect for the development control system is quickly undermined if unauthorised development, which is unacceptable on its planning merits, is allowed to proceed without any apparent attempt by the planning authority to intervene before serious harm to the community results."*

5.2 Reflecting on the two key objectives of the enforcement system detailed in paragraph 2.2 above, it is considered that the approach to enforcement should emphasise negotiation, the assessment of unacceptable impacts and a response proportionate in speed and effect to the scale and nature of the breach of planning control. Paragraph 3.5 above should form the basis of that approach.

## **6. RECOMMENDATION**

**6.1** It is recommended that the Committee:

- a] note the contents of this report, and
- b] agree that the guidance contained within paragraph 3.6 above should underpin the Planning and Building Control Division's approach to planning enforcement.

**Stephen Chorley**  
**Director of Development Services**  
21 August 2001 DVM/IMB/SA

### **LIST OF BACKGROUND PAPERS**

1. National Planning Policy Guideline 1 "The Planning System"
2. Planning Advice Note 54 "Planning Enforcement"
3. Circular 4/1999 "Planning Enforcement"

Anyone wishing to inspect the above papers please contact Dave Morris on 01563 576753

Implementation Officer: Alan Neish

**AGENDA**