

**TONBRIDGE & MALLING BOROUGH COUNCIL**

**SCRUTINY PANEL**

**08 February 2012**

**Report of the Director of Planning, Transport and Leisure**

**Part 1- Public**

**Matters for Recommendation to Overview & Scrutiny Committee – Non-Key Decision**

**1 PLANNING ENFORCEMENT**

**Summary**

**1.1 This report brings forward some suggested changes in procedure, communication and prioritisation of approach in carrying out the Council's planning enforcement function.**

**1.1.1 Introduction**

1.1.2 Members will recall that the previous meeting of this panel, on 15 September 2011, was an "open" session where the Panel heard from a range of stakeholders, including some Parish Councils, who were invited to speak and raise issues of interest to their organisation specifically or of a general relevance. Attached at Annex A is a summary of the points that were discussed, including the responses provided at the time.

1.1.3 It is worth noting that this Scrutiny Review has been taking place at a time when the Government is in the process of publishing its revised approach to planning guidance but the final guidance document is yet to be published. In addition the passing of the Localism Act 2011 has introduced the power for the Secretary of State to introduce greater enforcement powers in two respects:

- Allowing the Local Planning Authority (LPA) a longer period for investigation of potential breaches of planning control where the breach has been actively hidden from the LPA
- Allowing the LPA to decline to determine a retrospective application where an enforcement notice has already been served.

1.1.4 In practice this will have only a minor bearing on the typical casework in the Borough and the changes fall short of the constructive suggestions that the Council has expressed to Government in order to seek more powers to intervene in respect of unauthorised development and therefore limits the opportunities for further change that can be contemplated in this report.

## 1.2 Some changes to process and communications

1.2.1 Meanwhile, other elements of our own practice and procedure have also been under review in accordance with our general approach of continuous review and in response to dialogue with Members and other organisations. Since the previous meeting of this Panel, for example, the following changes have been introduced:

- List D (the record of decisions issued) is now produced and circulated to Members weekly, rather than being attached to Area Planning Committee agendas; this alerts Members more speedily to decisions that have been issued. This is base data to enable the identification of potential areas of breach of planning control earlier than the previous system allowed.
- Similarly, appeal decisions are circulated electronically to all Area Planning Committee Members when they are received, rather than being summarised in Committee agendas. This has the same benefits as the List D retiming.
- These changes have set a pattern that might also be used to advantage in considering how communication relating to enforcement matters could be improved.

1.2.2 As is apparent from the discussion that took place at the previous Panel, a lack of clarity appears to persist amongst some stakeholders as to the processes and procedures that must necessarily apply to planning enforcement. Members had appreciated the explanation provided on these matters in some detail in an earlier report to your parent Committee. I therefore propose that a document be prepared summarising what legal requirements must be met and what actually happens during the course of a planning enforcement investigation. This will set out what we do and the context within which decisions must be made. The document can be made generally available through the Council's website and publicised through Here and Now and other means.

1.2.3 One particular issue that could, we feel, be explained in some detail here relates to retrospective applications, when it is appropriate to seek them and the considerations that apply in determining them – especially in the new context set by the Localism Act. I am aware that many Members and indeed others, for whom the planning enforcement process has implications, feel that retrospective applications are wrong as a matter of principle and should not be allowed. This is an issue upon which the Borough Council has, in the recent past, made representations to Government. It is however worth noting that while the recently enacted Localism Act has strengthened our enforcement powers in some respects, particularly with regard to the deliberate concealment of unauthorised development, as indicated above, the real impact of the legislative change, when it comes into force, is likely to be very limited in practice. In my view it will not deter applications in retrospect – the Localism Act changes do not take away the legal right, in itself, to apply retrospectively.

- 1.2.4 A suggestion was put forward that Members might find it helpful to have a periodic list of enforcement investigations that have been instigated and those that have been concluded (somewhat similar in principle to the current “List B” and “List D”). We have looked at this and propose that lists of cases opened and cases closed be circulated to Members on a weekly basis. We are currently looking at the format that these lists might take, for example how much detailed information it would be appropriate to include, bearing in mind that every Member is already individually notified of a case in their Ward. Members’ views on this would be helpful. We intend to share some possible formats at this meeting of the Panel.
- 1.2.5 We have given some further consideration as to whether it would be possible or desirable to share these lists more widely, for example with Parish Councils. Members will recall that there was previously some discussion about the advisability of this, given that unless and until a breach is actually identified there is always the risk that information becomes public and widespread where no evidence subsequently emerges. This has the potential to lead to embarrassment or possibly worse. Not all enforcement complaints turn out to be founded on real evidence and, worse, some could be made maliciously. Moreover, there are occasions when, being forewarned of the fact that an investigation is under way, alleged culprits may seek to disguise or conceal what is actually happening, thus frustrating the investigation notwithstanding the emerging Localism Act powers in that respect.
- 1.2.6 In the light of these considerations, we consider it would not be appropriate to publicise the list of new cases more widely. However, the list of closed cases should be shared with Parish Councils and others. The point has been made that Parish Councils may have local information that could, on occasion, assist in an investigation. This is of course true and in some cases might be useful to the Council’s investigations. Where this is believed to be useful we will continue to seek factual information from a Parish Council on a case-by-case basis and in confidence.
- 1.2.7 There was a certain feeling amongst some Members of a lack of involvement in decisions as to whether a particular case should be reported to Committee. Currently, under the Council’s Constitution, authorisation to serve an Enforcement Notice must be sought from the relevant Area Planning Committee, except in cases of emergency. Other notices (such as Breach of Condition Notices and Planning Contravention Notices – the latter being an investigatory tool alone) do not require Committee sanction.
- 1.2.8 The Chief Solicitor alone is empowered to make the decisions on whether to prosecute (for example in relation to the unauthorised display of adverts or for unauthorised works to protected trees or where an Enforcement Notice is in force but not complied-with). These decisions are bound by the guidance provided by the Crown Prosecution Service – Code for Crown Prosecutors.

- 1.2.9 Our current practice, in accordance with Constitution, is to report to Committee those cases where there is significant interest, or where unusual or particularly controversial issues arise whether, or not, we intend to recommend the service of an Enforcement Notice. Recent examples of this include the house erected at 44 Yardley Park Road, Tonbridge and the range of enforcement investigations on-going at Big Motoring World, Addington. These are, however, relatively rare occurrences and we will review whether reports of this nature need to be brought before Members more frequently. Our general view, though, is that with the “weekly lists” that are now proposed, the perceived need for this will be very limited and Members are encouraged to discuss cases with Development Control staff. Where a local Member makes a specific request for a particular site or case to be reported to Committee, this will be carefully considered in the light of legal advice and in consultation with the relevant Committee Chairman.
- 1.2.10 We also propose to review the detailed content of enforcement reports to Committee to reduce the amount of technical detail, which has become too extensive, thereby enabling Members to focus more readily on the key issues and decisions that need to be made.

### **1.3 Resources and Priorities**

- 1.3.1 One of the issues that generated some debate at the previous meeting concerned the amount of work that the Enforcement Section has to deal with, how this might be prioritised and the resources available to deal with enforcement matters generally. I welcome Members’ recognition that, because of the number and range of cases that come forward and the high public profile and complexity of some of them, there are inevitable pressures that emerge in resolving conflicting objectives, in the allocation and effective use of staff time and other resources, and in a number of other ways. Needless to say, the resources that can be devoted to the enforcement task are limited, and I welcome the general call to consider some form of formal prioritisation in terms of the types of cases we have to deal with. A suggested way in which this triage might work in practice is attached at Annex B. This simple approach has been devised to reflect the fact that there will be no practical opportunity to add to our current resources. Within broad definitions the table has been left deliberately brief to enable Members to add to the circumstances around cases in each of the categories. It should also be established practice to provide feedback to interested parties, including Parish Councils, at the appropriate stage when decisions have been taken about enforcement cases or an update following a complaint or representation.
- 1.3.2 With regard to the level of resources devoted to enforcement generally, I have obtained some comparative data from Authorities across Kent from the recent survey undertaken by the Kent Planning Officers Group, and this is attached at Annex C. This relates to staff directly working on planning enforcement. It can be seen that the level of staff that the Borough Council employs in this area is around the Kent district average. Obviously, this data must be interpreted with some care as different Authorities will have varying ways of working and will have a varying

case load. For instance, in some authorities other Development Control staff will from time to time be involved in planning enforcement, which is traditionally the case here. Also in some cases a proportion of administration staff have been included which is not the case with the Tonbridge and Malling figure. The figures do not include legal resources, which are obviously a consideration in overall terms. However, the summary provides an overall assessment which places the Borough Council in the centre of the field.

- 1.3.3 One of the issues that remains as a limitation of practical resources is the “early warning” of potential breaches via colleagues in Building Control when they inspect a site. As Members are aware the Building Control system is subject to competition and private “Approved Inspectors” do not currently provide the same practical “eyes and ears” service to assist the planning enforcement process as we are able to gain from our in house Building Control service. This remains an area of concern and we feel that the Council should approach the Secretary of State to suggest that a system is devised whereby “Approved Inspectors” are required to provide the earliest possible alert of the commencement of works on a site under that Inspector’s control and have a form of ‘duty to co-operate’ with the Planning Authority in its investigations.

## **1.4 Conclusion**

- 1.4.1 I hope Members will agree that this review has identified a number of practical points that can be implemented or warrant further work and can be seen as improvements to the way we operate and communicate in the field of planning enforcement. I would welcome Members’ views on the various proposals contained in this report. This will help in preparing final proposals for presentation to a future meeting of your parent Committee.

## **1.5 Legal Implications**

- 1.5.1 The town and Country Planning Acts provide the essential legal framework for the range of duties and powers for planning enforcement. There are no implications arising from this report.

## **1.6 Financial and Value for Money Considerations**

- 1.6.1 There are none directly arising from this report. The Council’s staff resource allocated to planning enforcement is broadly average within the analysis of Kent district authorities.

## **1.7 Risk Assessment**

- 1.7.1 Assessments are effectively carried out by officers in assessing the approach to be taken on individual cases and by Members in assessing the merits of serving an enforcement or stop notice. The approach to prioritisation outlined in the report will assist in this process.

## **1.8 Policy Considerations**

- 1.8.1 The Local Development Framework and Government policy/guidance (soon to be updated in the anticipated National Planning Policy Framework) sets out planning policies against which decisions as to enforcement are taken.

## **1.9 Recommendations**

- 1.9.1 Members are asked to endorse the initiatives included in this report and add any further matters for consideration by the Overview and Scrutiny Committee.

Background papers:

Previous reports to the Overview and Scrutiny Committee

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