

TONBRIDGE & MALLING BOROUGH COUNCIL

PLANNING and TRANSPORTATION ADVISORY BOARD

18 November 2009

Report of the Director of Planning, Transport and Leisure

Part 1- Public

Matters for Information

1 ENFORCEMENT OF PLANNING CONTROLS

To set out the broad context by which planning enforcement investigations proceed and are concluded.

1.1 Powers and procedures

- 1.1.1 Planning enforcement issues are consistently topical and often high profile. In the context of an ever increasing awareness of these matters, growing business for us and a good number of complex and controversial cases, the opportunity is taken in this report to set out some clear pointers that guide our processes and decision making.
- 1.1.2 Planning legislation provides powers to the Local Planning Authority to take action against unauthorised development where this is justified in planning terms following an investigation.
- 1.1.3 The process whereby an investigation is triggered is often as a result of a complaint from a third party or a Member or the identification of a potential breach of control by a member of staff in the course of their duties.
- 1.1.4 Cases are recorded and managed through our computer system. The stages in the process are as follows:
- Receipt of complaint
 - Establish if the cause of the complaint has actually occurred
 - If yes, then to establish if this is development subject to planning control
 - If yes, does it need the approval of the Council?
 - If yes, does it have approval?
 - If no, is the situation acceptable or not, in terms of the normal judgements to be made in planning decisions?

- If no, then the process of enforcement action should be commenced and ultimately an enforcement notice served
 - If yes, establish if the development can be allowed to remain without the need to make minor alterations or make some controls – do not enforce or issue a Notice seeking a partial remedy ('under enforce') as appropriate. Invite an application for retrospective planning permission.
- 1.1.5 At each stage it is necessary to assess the information and make a judgement as to what to do next. This is not an administrative process but requires a judgement and decision to be made at every stage.
- 1.1.6 Planning enforcement is not punitive process and must be embarked upon only if there is clear demonstrable harm arising from the breach of planning control concerned.
- 1.1.7 The position is summed-up in Planning Policy Guidance 18 (PPG18) – Enforcing Planning Control which local Planning Authorities are bound to observe in the consideration of enforcement issues;

“7. While it is clearly unsatisfactory for anyone to carry out development without first obtaining the required planning permission, an enforcement notice should not normally be issued solely to "regularise" development which is acceptable on its planning merits, but for which permission has not been sought. In such circumstances, LPAs should consider using the new "planning contravention notice" to establish what has taken place on the land and persuade the owner or occupier to seek permission for it, if permission is required. The owner or occupier of the land can be told that, without a specific planning permission, he may be at a disadvantage if he subsequently wishes to dispose of his interest in the land and has no evidence of any permission having been granted for development comprising an important part of the valuation. As paragraph 14 of DOE Circular 2/87 (WO 5/87) points out, it will generally be regarded as "unreasonable" for the LPA 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, that there is no significant planning objection to the breach of control alleged in the enforcement notice. Accordingly, LPAs who issue a notice in these circumstances will remain at risk of an award against them of the appellant's costs in the enforcement appeal.”

- 1.1.8 The final part of this paragraph is crucial as any enforcement notice served is capable of being held in abeyance by an appeal being made and the Council being required to demonstrate why the offending development is unacceptable in planning terms.
- 1.1.9 There are occasions where it is necessary for the Local Planning Authority to consider whether the breach is so unacceptable that it needs to not only serve an Enforcement Notice but also a Stop Notice which requires the development to cease and either the use or the works to be stopped with immediate effect. Such measures should only be utilised in cases of extremely undesirable development

and the key to the use of the Stop Notice is that it can only be used under the circumstances where the LPA has investigated and assessed the development as being wholly unacceptable and in need of immediate cessation. Under some circumstances it is possible that Costs/Compensation may be payable if the Enforcement Notice/Stop Notice is subsequently overturned on appeal or withdrawn if this reveals unreasonable behavior on behalf of the LPA (and for instance contracted works are suspended as a result).

- 1.1.10 In 2005 new powers were introduced to enable the service of a Temporary Stop Notice. These may be served in cases of extreme emergency where the implications of the alleged breach are so direct that the breach should be suspended immediately. However such Notices can be applied only once to any case and then only apply for 28 days maximum. Effectively they allow the LPA time to organise the subsequent service of an Enforcement Notice. In certain circumstances compensation may be payable.
- 1.1.11 A Temporary Stop Notice cannot be used against use of a building as a dwelling house. Neither can such a Notice be used to stop use of land as a residential caravan site where the caravan is the main place of residence (although there are some specific circumstances where this limitation does not apply).
- 1.1.12 There are times, of course, where the service of an Enforcement Notice does not have the desired effect and the breach of control does not cease. In those circumstances consideration has to be given to Prosecution for failure to comply. This will require evidence to the high standard of the Magistrates' Court where such prosecutions are taken. This standard of proof is "beyond reasonable doubt" and the Chief Solicitor has the ultimate responsibility to assess the available evidence in the context of the necessary tests as set out in the Code for Crown Prosecutors - which requires a prosecution should go ahead only if there is both adequate evidence and it is in the public interest. Should a breach continue after a first prosecution then it may prove necessary to take action against a repeat offence in an endeavour to "raise the stakes" in any fines to encourage cessation.
- 1.1.13 In extreme circumstances it may be necessary to seek an Injunction, usually in the High Court, to require the cessation of the breach with the transgressor facing the risk of imprisonment for failing to respect the instruction of the Court. This is a rare procedure to adopt but the Council has not shrunk from such an approach where it has proved necessary.
- 1.1.14 The processes described above apply to the use of land. Action on breaches of tree controls, advertisement controls and also unauthorised works to Listed Buildings is dealt with through the prosecution process and is subject to the same considerations as identified above.
- 1.1.15 Behind all of these matters is, of course, a myriad of legal documents and provisions that set the practical constraints that have to be adhered-to for all of what is set out above.

1.2 The Process

- 1.2.1 As identified in paragraph 1.1.4. above there is, of necessity, a formulaic regime to ensure that the necessary stages of the investigation are carried-out to enable the appropriate judgement to be made at every stage.
- 1.2.2 Inevitably however not all cases are of the same severity, same level of risk or same importance either in principle or practice in terms of the adverse impact of material planning considerations. As a result our investigations are always prioritised and even if there is a *prima facie* breach it will not be appropriate to pursue matters further than the very initial stages if the impact could not justify any further action. Our processes will always favour speedy action in cases where difficulties of noise, smell or safety require immediate attention to prevent unacceptable living conditions arising and putting people at risk.
- 1.2.3 The sheer weight of complaints a year means that there is also a need to prioritise to cases as it is simply not possible to complete all cases to a satisfactory level to justify action.
- 1.2.4 In all cases the system operated seeks to ensure that local members and other interested parties are notified of our initial investigation and subsequent findings and kept informed of progress on cases. This in itself can place a significant burden and we are currently developing and improving a uniformed based system to assist in this customer focused part of the process.

1.3 Conclusion

- 1.3.1 This report is intended to identify the complexity of decision making that lies behind the superficially simple process of planning enforcement and seeks to emphasise the importance of prioritization and communication in delivering the service.

1.4 Legal Implications

- 1.4.1 All necessary statutory and legal steps must be adhered to.

1.5 Financial and Value for Money Considerations

- 1.5.1 There is a financial cost to providing a planning enforcement system which is a power and not a duty on the LPA. However, in reality, the LPA is required to operate this function if it is to avoid adverse findings of maladministration by the Ombudsman. Other costs may be avoided by the proper operation of the system and good decision making.

1.6 Risk Assessment

- 1.6.1 Risk will be minimised by adhere to proper procedure, recording and decision making.

Background papers:

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Nil

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