

Scrutiny (Community and Regeneration) Committee

Wednesday 12 October 2016 at 6.00pm

Key Questions for Planning Enforcement

The Committee was only able to deal with Questions 1 to 5 inclusive at its meeting and requested written answers to the remaining Questions. The officers' response to Questions 6 to 18 is set out below.

In responding to Questions 1 to 5 officers referred to the Council's Planning Enforcement Plan. This is available to view on the Council's website via the following link: <http://www.dover.gov.uk/Planning/Planning-Applications/PDF/Enforcement-Plan.pdf>

The Plan describes the scope of planning enforcement, what needs to be taken into account when deciding whether or not to pursue enforcement action, what powers are available and includes a flow diagram to illustrate the enforcement process. Members should find this useful in providing context and background to the following answers to the Committee's Questions.

Q6. Is a lack of resources affecting the enforcement of planning conditions?

Answer: The level of resources needed depends upon the level of enforcement that the Council requires. In considering the level of enforcement account needs to be taken of the different types of condition that are imposed on permissions. These can be grouped into the following:

- i) time limit on implementing the permission,
- ii) conditions requiring the submission, approval and implementation of further details by specified times e.g. prior to commencement, prior to occupation, and
- iii) conditions that impose restrictions on the development once it is operational e.g. hours of use, noise levels, removal of permitted development rights

Our starting position with regard to conditions is that it is for the beneficiary of the permission to decide when to commence and it is their responsibility to adhere to the terms of conditions. If they object to the terms of a condition(s) they can appeal to have it amended or removed or, alternatively they can apply for a variation/removal – see answer to Question 17. Currently we do not therefore routinely make site inspections simply to check on whether commencement has been made on implementing a permission (the first type of condition). To do so would be exceedingly time consuming and a rather academic exercise. Having said this, the Regeneration Section does contact applicants/developers for larger residential schemes to find out their intentions for implementing permissions as part of the annual audit of housing land supply.

With regard to the second type of condition, the onus is on the developer to provide the required material at the right time and it is the developer's decision whether to address all such conditions in one application or in separate ones. Around a year and a half ago we created a specific Conditions Officer post to deal with such applications. When approving material under one condition, this Officer will look to see whether other conditions remain outstanding and will remind the applicant/developer accordingly and monitor the situation.

The third type of condition is not routinely monitored – to do so would be extremely onerous bearing in mind the accumulated number of such conditions over time and across the District. Instead, the enforcement team will respond to complaints of alleged breaches of condition and take action in accordance with the guidance in paragraphs 5.7 to 5.11 in the Enforcement Plan. This is the most efficient use of the available enforcement resource.

If the Council decided that it wanted the enforcement of conditions to be undertaken in a more pro-active way this could only be achieved by expanding the enforcement team. The case for this would need to be considered in the context of staff shortage in the Development Management team (responsible for dealing with planning applications) and the low level of planning officers within the Regeneration Team.

Enforcement Performance

Q7. How long does the average planning enforcement case take to reach conclusion?

Answer: The average length of time taken to deal with cases that were opened and closed during the two year period between the end of September 2014 and 2016 was 163 days, or just over 23 weeks. This average will comprise, at the extremes, of cases where investigation has determined that there was no breach of planning control and it was closed quickly, in contrast with cases where there is a breach and a planning application was subsequently submitted to regularise the situation or formal enforcement action was taken and appealed. The enforcement case would not be closed until the planning application and appeal processes had concluded which could obviously be a considerable time. In officers' opinion, not too much can be read into this statistic because of the wide variance of case types but it is a figure that can be used annually to indicate whether enforcement cases generally are taking more or less time to close.

Q8. Is there a backlog of planning enforcement cases and if so, how many and what is being done to clear it?

Answer: There is currently an outstanding caseload of around 200 complaints. This is relatively steady. The time taken to deal with cases varies enormously. The quickest cases are usually those where a complaint is investigated and no breach of planning control is found leading to the case being closed. At the other extreme, a case that leads to serving an enforcement notice that is subsequently appealed may take many months or even years. There will, therefore, always at any one time be an outstanding

caseload. The issue is more one of ensuring that there is sufficient enforcement staff to maintain the outstanding caseload at a steady and reasonable level. The current level of staffing can keep the outstanding caseload at around 200.

Q9. Are Kent Highways and Highways England responsible for delaying enforcement action in some cases and if so, what can be done to resolve this?

Answer:No. They have their own enforcement agencies and will only be involved in LPA enforcement matters if their technical advice and support in respect of LPA enforcement is required.

Prioritising Enforcement

Q10. Who in the department decides exactly what is in the public interest, because this is a very regularly used phrase to councillors and to the general public when the enforcement team state that it is not in the public interest to pursue this matter. With the greatest respect I would suggest that the public have a very different perception of what is in their interest.

Answer:The adopted Planning Enforcement Plan sets out in Chapter 5 (especially paragraphs 5.5 and 5.9) the factors that are taken into account. Careful consideration is always given over the expediency of any course of action and the decision on how to proceed is taken by the investigating officer's recommendation being agreed, or not, by a senior officer with ultimate responsibility resting with the Head of Regeneration and Development.

With regard to the issue of expediency, Section 172 of the TCPA 1990 states that an LPA may issue an EN where it appears to them that there has been:

- (i) A breach of planning control
- (ii) **It is expedient** to issue the notice, having regard to the provisions of the development plan and to any other material considerations

It is clear that whether it is expedient must be considered in the context of the development plan.

The NPPF provides that LPA's must act proportionately when taking enforcement action and the PPG directs LPA's to be mindful the human rights implications of taking enforcement action – both of which go to the issue of expediency.

The (now revoked) PPG 18 posed several questions which were designed to inform a decision on expediency. Despite no longer having any force they remain a useful tool for when contemplating issuing an EN, the questions are:

1. Does the breach of planning control unacceptably affect public amenity?
2. Is enforcement action commensurate with the breach of planning control to which it relates (this is essentially the proportionality point the NPPF makes)
3. Would the unauthorised development be likely to be granted planning permission if an application were made? (This is also a ground of appeal to an EN)
4. Was the unauthorised development carried out by a small business or a self-employed person? If so, informal discussion should be encouraged, for instance,

as to how the business activity could be adapted to minimise the harm to the local amenity.

5. In considering expediency with regard to private householders, the LPA should have full regard to what would have been permitted if the development had been carried out in accordance with the relevant provisions (the PD rights now contained in the GPDO 2015)

PINS have a guide to enforcement appeals in which it advises LPA's to consider carefully the evidence base for issuing an EN and whether they have a sufficiently strong case and also advises that informal discussions should be the starting point.

Where formal enforcement action is to be pursued the views and recommendation of the Legal Section is often sought. A view expressed by a member of the public on whether enforcement action should be taken does not necessarily reflect the public interest because it may not take account of all the factors mentioned above.

- Q11. Why is the planning enforcement team willing to tackle with all its powers the soft targets, such as elderly couples who paint their door the wrong shade, but they ignore big developers who ignore planning conditions?

Answer: It is not accepted that Enforcement ignores big developers who are not compliant with their planning conditions. We investigate all complaints of alleged breaches of planning control. It is, however, usually simpler and quicker to deal with a complaint that relates to a straightforward breach where the facts are evident e.g. the colour of paintwork. This may, therefore, give the impression that these are targeted when in fact, the resolution is simply quicker due to the nature of the breach. Complaints relating to matters such as excessive noise, construction traffic routing, hours of work etc. on large development sites often involve much more investigation time to gather evidence that demonstrates a persistent breach. This can appear as inaction to the public but, in fact, often takes up a great deal of officer time. In our experience developers of large schemes have a clear understanding of the requirements set by planning conditions but their construction management programmes are highly complex and they sometimes decide, at their own risk, to proceed in breach of a condition in order to maintain their programme. If, nonetheless, this is a matter of timing rather than an intention not to address a condition we would usually work with them to ensure compliance as soon as possible and formal enforcement action is not therefore going to resolve the situation any quicker.

- Q12. Why is the Sandwich Conservation area not consistently enforced given that Velux Windows appear to be allowed in some streets but not others?

Answer: If a complaint is received it is investigated and we aim to be consistent in our enforcement decisions. The facts behind individual cases can often be significantly different though and not make them directly comparable. Without more specific information it is difficult to comment further

Q13. Is there a time limit within which action must be taken in respect of a breach of planning conditions, particularly in respect of Lydden?

Answer: Yes – 10 years from commencement of the breach

'Stop Notices'

Q14. How many “stop notices” has the Council issued in the last 3 years?

Answer: None

Q15. What are the criteria for issuing “stop notices”?

Answer: This is set out in the Councils Planning Enforcement Plan (page 22)

Communication with Elected Members

Q16. In the planning enforcement departments dictionary what please is the definition of the word regular?

The background behind this question being that approximately 3 years ago all councillors were invited to the first of a regular series of presentations by the enforcement team on their work, and we were given an up to date list of the 300 plus active cases, and promised regular updates, is regular once a century or once a millennium.

Answer: This issue was discussed at the September meeting of the Planning Committee in response to an update report on enforcement activity. The Committee agreed to have an in-depth report on the enforcement caseload followed by regular updates to provide year-on-year statistics and a summary of actions taken.

Communicating Variations on Major Developments

Q17. What is the process for advertising variations to large planning applications and what is done to ensure that the detail of the variation is communicated in such a way that the ordinary person can understand it?

Answer: The national Planning Practice Guidance describes the two ways in which a variation to a planning permission can be made – see <http://planningguidance.communities.gov.uk/blog/guidance/flexible-options/>

The first of these (known as a Section 96A application) relates to changes that are non-material amendments. Applications for such amendments are not legally applications for planning permission and the statutory requirements for public consultation do not apply. Local authorities therefore have discretion regarding notifying anyone or seeking views but the Guidance states that by the very nature of these applications consultation or publicity is unlikely to be necessary.

The second procedure (known as a Section 73 application) relates to proposed changes that are considered to be minor material amendments to a planning permission. This is an application for planning permission and, if approved, results in issuing a new planning permission incorporating the amendment. The usual requirements for consultation and publicity apply.

The description of either such applications is, of course, written by the applicant. Where we think it is inaccurate, repetitious or hard to understand we seek to agree changes that use plain language unless the nature of the proposal requires the use of legislative, technical language i.e. where a definition in law may be appropriate. It is always open to Members to approach the validation team or Case Officer where any such description or language used is not clear or if assistance is required in interpreting a proposal.

Q18. What are the guidelines that officers use when determining whether to accept a request from a developer for a variation to planning conditions? Please could a copy of these guidelines be provided to councillors?

Answer: Please refer to the Planning Practice Guidance referred to in the answer to Question 17 which provides guidance on the scope of amendments that can be considered through the Section 96A and 73 procedures.