

PART 1 - PUBLIC

Decision Maker: **Development Control**

Date: **25th May 2010**

Decision Type: Non-Urgent Non-Executive Non-Key

Title: **PLANNING ENFORCEMENT**

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Ward: All

1. Reason for report

1.1 The ability to take enforcement action against breaches of planning control is essential to the effective operation of the development control process and to maintaining public confidence and credibility in the planning system in general.

1.2 A report was submitted to Development Control Committee in 2008 which reviewed the effectiveness of planning enforcement in Bromley and made recommendations for improving enforcement service delivery. The Chairman has requested a further report which provides an update and suggests ways in which effectiveness could be further improved.

2. **RECOMMENDATION**

2.1 Members views are requested.

Corporate Policy

1. Policy Status: Existing policy.
 2. BBB Priority: Quality Environment.
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Financial

1. Cost of proposal: N/A
 2. Ongoing costs: N/A.
 3. Budget head/performance centre: Planning Investigation/Enforcement section within Development Control
 4. Total current budget for this head: £133,530
 5. Source of funding: Existing revenue budget for 2010/11
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Staff

1. Number of staff (current and additional): 4.0fte
 2. If from existing staff resources, number of staff hours:
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Legal

1. Legal Requirement: Statutory requirement.
 2. Call-in: Call-in is not applicable.
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): Borough wide
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? N/A.
2. Summary of Ward Councillors comments:

3. COMMENTARY

Background

- 3.1 Part VII of the Town & Country Planning Act 1990, as amended by Sections 1-11 of the Planning & Compensation Act 1991, sets out the relevant legislative framework for planning enforcement. S172 states that:

“where it appears to the LPA that there has been a breach of planning control.....and the authority considers it expedient to do so..... they may issue a notice requiring the breach to be remedied”.

- 3.2 The Planning Acts give Local Planning Authorities (LPAs) a range of powers to take enforcement action to remedy breaches of planning control. The decision as to whether it is ‘**expedient**’ to take enforcement action is at the LPAs discretion. Parliament has left it to LPAs to determine whether enforcement action is appropriate. In exercising its discretion as to whether enforcement action is expedient the LPA must have regard to the relevant policies in the Development Plan, the planning merits of the development and any other material considerations. If the development accords with UDP policies and does not cause material harm to any interests of acknowledged importance, such as visual amenity, residential amenity, highway safety, etc, then it may not be considered expedient to take enforcement action, but each case must be considered on its planning merits.
- 3.3 It has long been fundamental principle that carrying out development without planning permission is not a criminal offence, despite pressure to change the law to make it so. However, within the context of current planning legislation a criminal offence is only committed where development is carried out in breach of an effective enforcement notice.
- 3.4 The relevant guidance advises LPAs not to take enforcement action solely to regularise development which is otherwise considered to be acceptable. Failure to submit a planning application is not sufficient justification to take action. Any alleged breaches of planning control should be thoroughly investigated to establish the facts before deciding what course of action to take. An assessment of the facts, the planning merits and other material considerations should be carried out to enable a decision to be made. In many cases it may be concluded that no further action is required.
- 3.5 In 1989 the Carnwath Report (“Enforcing Planning Control”) made a number of recommendations to improve the effective enforcement of planning control which continue to form the basis of the present system.
- 3.6 Policy guidance - PPG18 ‘Enforcing Planning Control’ - was published in 1991. Circular 10/97 (“Enforcing Planning Control: Legislative Provisions and Procedural Requirements”) was published in 1997.
- 3.7 Circular 10/97 was accompanied by a detailed practice manual (“Good Practice Guide for LPAs”). The guidance takes the form of a comprehensive manual, dealing with the whole range of enforcement procedures, including investigation of alleged breaches, deciding whether to take enforcement action, issuing enforcement and stop notices, planning

contravention notices, breach of condition notices, enforcement notice appeals, prosecutions, injunctions, direct action, etc.

- 3.8 Where development is carried out without planning permission the Planning Acts make provision for the submission of a retrospective planning application. If no retrospective application is received, the planning merits of the unauthorised development need to be assessed, in much the same way as a formal planning application, before a decision is made as to whether enforcement action is taken.
- 3.9 The guidance makes it clear that enforcement action should not be taken solely to regularise development which is otherwise acceptable or to obtain a fee for an application. The fact that the development has already taken place should not be a determining factor when deciding whether to take action. In balancing private and public interests, LPAs should not be pressured into taking enforcement action to protect private interests, particularly where this would not be in the public interest.

Planning Enforcement in Bromley

- 3.10 Bromley has traditionally experienced a relatively high level of enforcement activity. This is due to a variety of factors, including the high pressure for development, its attractive environment extensive protected areas including Green Belt and Conservation Areas and a high number of listed buildings. It is also a reflection of an articulate and vigilant population who regard environmental protection as a high priority.
- 3.11 The Council receives around 1000 complaints per year concerning alleged breaches of planning control. 932 new complaints were received in 2009 relating to a wide range of alleged breaches falling within the following main categories:

<u>Type of Complaint</u>	<u>No. complaints</u>	<u>%</u>
Operational development	333	35
Not in accordance with approved plans	88	10
Commercial activity	77	8
Untidy site	73	8
Breach of condition	65	7
Unauthorised advertisement	58	7
Material change of use	52	6
Boundary fences & walls	49	5
Satellite dish/telecom mast	20	2
Parking commercial vehicle	13	1
Other (eg. accesses, HMOs, licensing, flytipping, shopfronts, travellers, etc.)	104	11

- 3.12 Enforcement notices were issued in 2009 in respect of 113 alleged breaches of planning control, reflecting the high number of complaints received. Comparison with other London Boroughs shows significant variations in enforcement activity from 340 notices issued in Westminster to only 4 notices in Hillingdon.
- 3.13 The majority of enforcement notices are the subject of appeals to the Planning Inspectorate and in 2009 there were 35 enforcement appeal decisions in Bromley, of which 21 were dismissed or part dismissed and 13 were allowed.
- 3.14 Notwithstanding the high number of enforcement notices issued in Bromley, formal enforcement action is taken in only a relatively small proportion of cases, where the matter cannot be resolved by negotiation or submission of a planning application. Only about 10% of investigations of alleged breaches of planning control result in enforcement action.
- 3.15 Once a breach of planning control has been investigated a range of courses of action is possible, the most common being :
- no breach identified – no further action
 - retrospective planning application submitted
 - permission granted – no further action
 - permission refused – enforcement action
 - negotiate amendments to achieve acceptable resolution
 - request additional information about alleged use/development
 - further investigation to obtain additional evidence
 - enforcement action to rectify breach
- 3.16 The majority of decisions to determine whether to take enforcement action are made under powers delegated to the Chief Planner. A small number of cases are reported to committee including the more contentious cases or where Members' views are requested. In the event of a retrospective application being received, the planning merits are considered in the same way as a normal application. The fact that the application is retrospective should make no material difference to the consideration of the planning merits.

Investigation of Complaints

- 3.17 The effectiveness of the enforcement service is largely dependent on the ability to respond to changing priorities and fluctuations in workload. The majority of complaints are dealt with by the Planning Investigation Section within the Development Control Division. The Section comprises 3 full-time Planning Investigation Officers, who are all former police officers with extensive practical experience of criminal investigations, and a Technical Clerk, under the direction of the Development Control Manager, who is also responsible for the management of the Planning Appeals Section. There is also a part-time Technical Clerk whose main duties relate to licensing matters (approx. 180 applications per annum).

- 3.18 When a complaint is received the investigation process comprises a number of key stages from site observations and identification of owner/occupiers to an assessment of the planning merits and whether enforcement action is expedient. It is difficult to generalise as each case is unique and the timescales involved may vary considerably. All complaints are acknowledged on receipt and efforts are made to keep the complainant informed of progress throughout the investigation process. However, due to constraints imposed by limited resources it is acknowledged that this is not always possible in every case.
- 3.19 A weekly list is prepared providing details of all new complaints received, including those received from Members. The list is intended for internal monitoring purposes only as it contains details of complainants whose identities must remain confidential and is therefore not available for public inspection. It provides a useful means of monitoring progress on individual cases and maintaining a record of action taken.
- 3.20 The investigation process can be protracted, particularly if repeat site visits are necessary or owner/occupiers fail to respond to requests for information or to provide access to the site. Some of the more straightforward cases, involving domestic extensions or boundary fences, can be resolved quickly within a matter of days of receipt. However the more complex cases, such as occupation of land by travellers or deposit of waste, may take considerably longer to deal with, particularly if an appeal or protracted legal proceedings are involved.
- 3.21 In cases where enforcement action has been authorised instructions are prepared and sent to the Council's Legal Department to prepare and issue the notices. This involves making legal enquiries to establish ownership and interests in land to ensure that the notices are correctly served. The notices are then drafted, checked and issued. The notices commonly issued by the Council are:

(i) Breach of Condition Notice

- 3.22 If planning permission has been granted subject to conditions which have not been complied with, the Council can serve a Breach of Condition Notice on any person who is carrying out the development or any person having control of the land. The Notice will specify the steps, which the Council consider ought to be taken to secure compliance with the conditions. The minimum period for compliance is 28 days beginning with the date of service. The Act provides that, if the person who is served with the Notice fails to comply with it, he is guilty of an offence that shall be tried in the Magistrates' Court and subject to a maximum penalty of £1000. There is no right of appeal to the Planning Inspectorate. On the other hand, it is open to a defendant to attempt to challenge the validity of the notice as a defence to a prosecution. Breach of Condition Notices are most effective for the more straight forward breaches of planning control.

(ii) Enforcement Notice

- 3.23 If it appears to the Council that there has been a breach of planning control and that it is expedient to issue the Notice, having regard to the provisions of the development plan and to any other material circumstances, the Council can serve an Enforcement Notice on the owner and occupier of the land and on any other person having interest in the land, which, in the opinion of the Council, is materially effected by the Notice. Service of the Notice shall take place not more than 28 days after its date of issue and not less than 28 days before the date specified in it as the date it is to take effect. There are three types of Enforcement Notices

depending on the breach of planning control alleged, i.e., for operational development, material change of use or breach of condition. There is a right of appeal to the Planning Inspectorate against the terms of an Enforcement Notice. The grounds are:

Ground A (that planning permission ought to be granted);
Grounds B and C (no breach of control is alleged or has occurred);
Ground D (there is immunity from enforcement);
Ground E (improper service) and
Grounds F and G (excessive requirements and unreasonably short period for compliance)

- 3.24 As a result of the appeal provisions, it may be some months after issue before an Enforcement Notice takes effect. However, an Enforcement Notice, once it has taken effect, is a legally robust remedy. The Town and Country Planning Act provides that the validity of an Enforcement Notice shall not, except by way of an appeal to the Planning Inspectorate, be questioned in any proceedings on any of the grounds on which such an appeal may be brought. The effect is that on a prosecution, the Court will direct its attention to the question of whether the steps required by the Enforcement Notice have been complied with. A prosecution alleging failing to comply with an Enforcement Notice can be tried in either the Magistrates' Court or the Crown Court. In trial in the Magistrates' Court the maximum penalty is £20,000 and in the Crown Court, an unlimited fine.

(iii) Section 215 Notices

- 3.25 If it appears to the Council that the amenity of part of their area is adversely affected by the condition of the land they may serve on the owner and occupier a notice requiring such steps as may be specified to remedy the condition of the land. The notice shall take effect on the date specified which shall be not less than 28 days after service. There is a right of appeal to the Magistrates Court who have the power to uphold, quash or vary the terms in favour of the appellant. There is a right of further appeal to the Crown Court. It is an offence for the owner and occupier of the land to fail to take the steps required by the notice. The offence is tried in the Magistrates Court and is punishable by a maximum £1000 fine.

Monitoring of casework

- 3.26 Regular meetings are held between the Planning and Legal Departments to monitor progress on individual cases and provides a forum to discuss related legal issues, In many cases, after the complaint has been initially investigated and steps are being taken towards enforcement action, events take place which lead to the process being put "on hold" pending an outcome such as the hearing of an appeal, the processing of a planning application or steps towards compliance. This may be before or after instructions have been passed to the Legal Department. These are legitimate reasons for temporarily halting the enforcement process if it is likely that the breach of planning control will be resolved as a result.
- 3.27 To date, such events may have led to a perception that a matter was simply being ignored or forgotten, where that is not the case. The matter would show up in the statistical enforcement report as being inactive, whereas in reality, steps towards a resolution are taking place elsewhere. A refinement to the recording and monitoring system used by the Planning and Legal Departments (UNiform) is being put into place to deal with this. This will enable a matter to be shown as having been actively suspended from the outstanding matters list for the period during which other action is taking place – appeals, planning applications etc and give a

more accurate reflection of the level of active but outstanding cases. In the event of an unsatisfactory outcome, then the matter would be reactivated and progressed. It is intended that this facility is available for all new cases.

Priorities for Investigation

- 3.28 Wherever possible, new complaints are acknowledged on the date they are received. In practice, the timescale to investigate a complaint can vary considerably, dependent on the nature of the breach, whether repeat visits are required or whether the owner/occupier can be traced. Delays may also occur due to changing priorities, fluctuations in workload, or lack of staff resources and consequently it is not always possible to complete investigations as quickly as they should be. All complaints are investigated, including those which are subsequently found to be without foundation, factually incorrect or malicious. However, in practice some cases need to be given higher priority than others and in order to make best use of the available resources a system of prioritising complaints has been introduced.
- 3.29 In order to prioritise enforcement work and make effective use of available resources the following categories have been introduced:
- A. High Priority** – complaints by Members and those regarding serious breaches of planning control, (eg cases where unauthorised construction work is in progress requiring immediate action or involving works to a listed building).
 - B.** Unauthorised development, changes of use, breach of conditions, etc. where enforcement action may be required in the short to medium term.
 - C. Medium Priority** - 'Householder' development involving a wide range of alleged breaches concerning domestic extensions, outbuildings, boundary fences and walls, parking of commercial vehicles, business activities, etc.
 - D.** Untidy sites and derelict properties which have suffered from lack of maintenance where remedial action is required in the medium term
 - E. Low Priority** - Unauthorised advertisements, hoardings, flyposting and other minor breaches where immediate action is not necessary but may be required in the medium to long term.
- 3.30 The above priorities are sufficiently flexible to be adapt to changing demands and circumstances. However they may be subject to review in the event of a change of circumstances, such as a significant increase in the number of complaints or reduced staff availability.
- 3.31 One factor which has affected the perceived effectiveness of planning investigation is an increase in the expectations of complainants. Complainants expect their concerns to be dealt with promptly and efficiently and may be dissatisfied if the investigation process takes longer than they had anticipated or fails to produce the outcome they had wanted. This dissatisfaction may be reflected in an increasing trend to challenge the outcome of investigations which in turn slows down the investigation of new cases. Another factor

concerns recent demographic changes which have created an influx of new residents from different cultural and ethnic backgrounds, who may not be familiar with the complexities of the British planning system.

Resources

- 3.32 The number of complaints concerning alleged breaches of planning control each year, is currently around approximately 300 cases per Investigation Officer per annum. The recent retirement of 2 experienced Investigation Officers has inevitably had a temporary impact on the processing of complaints.
- 3.33 The Council receives a substantial number of complaints about untidy sites and properties which have suffered from lack of maintenance over a prolonged period. Cases involving absentee landlords are a frequent problem which makes securing an improvement in the appearance of the site very difficult. Although not regarded as the highest priority the issue is nevertheless of considerable concern to the local community. There is some support for the principle of carrying out works in default to secure environmental improvements on key sites. This could be carried out at relatively small cost but could achieve significant results over a period of time.
- 3.34 Recent concerns have been expressed about a general lack of information about enforcement cases and the need for more effective monitoring. In order to improve the availability of information, and to publicise enforcement 'successes' where appropriate, it is proposed to provide regular updates to Members on cases in which they have initiated or are directly involved. Initially the aim will be to do this on a monthly basis, dependent on the number of cases involved. It is also proposed to increase the frequency of the bi-annual enforcement monitoring reports to DC Committee to every quarter in an effort to keep Members informed on a more frequent basis.

Enforcement Options

- 3.35 Once a notice has taken effect if it is not complied with, the Council will need to consider whether to pursue the following remedies:

(i) Prosecution

- 3.36 As mentioned above breach of planning control, by itself, is not a criminal offence. However, an offence arises if the steps specified in a Breach of Condition Notice, an Enforcement Notice or Section 215 Notice are not taken within the specified period. The Council has to prove every element of the offence on the criminal standard. For some cases, this will involve a fairly lengthy period where the evidence is collected. For an enforcement notice the Court is directed to have regard to any financial benefit, which has accrued or appears likely to accrue in consequence of the offence. However the penalties imposed by the criminal courts for planning offences are often not sufficient to prevent further breaches.
- 3.37 Recently a Court has made a confiscation order under the Proceeds of Crime Act 2002 in respect of the breach of an enforcement notice in the London Borough of Hounslow. As a result of this case, consideration will be given in all appropriate cases to making an application

for a confiscation order. To use the jurisdiction the Council will need to apply for the case to be transferred to the Crown Court for sentencing if the matter has been dealt with in the Magistrates Court. The prosecution makes a statement of information relating to the defendant's criminal lifestyle and any benefit allegedly obtained. The Court will then decide whether the defendant has a criminal lifestyle from which he has benefitted financially or whether he has benefitted from his particular criminal conduct. The benefit must not be less than £5000. If these criteria are met and the Court makes a confiscation order the recoverable amount is equal to the defendant's benefit from the conduct concerned. In the Hounslow case the confiscation order was made in the sum of £186,680.

(ii) Injunctions

3.38 The Council can apply to the Court for an injunction order to restrain any actual or apprehended breach of planning control where they consider it necessary or expedient. An application will usually be heard in the County Court. Human Rights law has impacted on this power. In the case of South Buckinghamshire Council v Porter the Court held that a judge should not contemplate granting an injunction unless he would be prepared if necessary to commit the defendant to prison for breach. Personal circumstances such as the defendants' family's health and education will be of relevance. So will the need to enforce planning control in the general interest and the planning history of the site. The degree and flagrancy of the breach and whether conventional enforcement measures have failed will be relevant. The Court may be reluctant to use its powers where enforcement action had never been taken. Previous planning decisions will always be relevant. An injunction order is a discretionary remedy and injunction must be proportionate i.e. appropriate and necessary for the attainment of the public interest objective but also not impose an excessive burden on the individual whose private interests are at stake. Injunction orders can be a very effective remedy as a defendant may be committed to prison for breach.

(iii) Carry out the steps required by an enforcement notice

3.39 The Act provides that where any steps required by an enforcement notice have not been taken the Council may enter the land and take the steps and recover from the person who is the owner of the land any reasonably incurred expenses. The Council can seek to recover the expenses as a debt and until recovered the expenses are a charge on the land binding on successive owners. The Council will normally need to resolve to incur the expenditure as recovery will happen subsequently. For these reasons the Council will need to agree a budget in advance of the works. Direct action can be an effective and immediate remedy.

Non-Applicable Sections:	Policy, Financial, Legal and Personnel
Background Documents: (Access via Contact Officer)	None