



Southern Area Committee

25th November 2004

Author: Stephen Hawkins
Principal Planning Officer (Enforcement)
01722 434691 Development control@salisbury.gov.uk

PLANNING ENFORCEMENT: COMPLIANCE WITH PLANNING CONDITIONS /SECTION 106 OBLIGATIONS; PROSECUTING BREACHES OF PLANNING CONTROL.

Report Summary:

This report outlines how the Council's Planning Enforcement Team now sets about monitoring and enforcing breaches of planning conditions and Section 106 Obligations. It details improvements made to the monitoring of compliance with conditions and Obligations this year. It also outlines the Council's approach to dealing with offences committed under planning legislation.

Introduction:

Members will be aware that SDC has for some considerable time placed a strong emphasis on the enforcement of planning control. The Council has a dedicated Enforcement Team led by a Principal Planning Officer.

The team investigates all enquiries received by the Council in relation to development undertaken without planning permission, listed building or advertisement consent and breaches of conditions attached to such permissions/consents and seeks to have such matters regularised. The addition of a Compliance Officer to the team in April 2004 has enabled more time to be devoted to routine monitoring of planning conditions and Section 106 Obligations to prevent breaches occurring in the first place.

The team should also contain a Planning Officer who also deals with some of the more complex cases. However Members should be aware that this particular post has effectively been vacant since January 2004 due to the long term illness and the subsequent departure of the previous postholder and has been filled for parts of that period with temporary staff. A recent attempt to recruit a new, permanent postholder did not attract applicants with the experience/knowledge/qualifications that the responsibility of the position involved requires.

Enforcement Policy:

Members will be aware that the principal objective of enforcement legislation is to remedy a breach of planning control causing harm to some acknowledged interest. It is not to punish the person responsible for that breach.

The Council informally adopted its own enforcement policy following a period of public consultation in 1999. The Council's policy is fully in line with Government's current general approach to enforcement, as set out in PPG18, an extract from which is appended at I.

Legislative powers:

Council's have discretion on whether to take enforcement action and exercise their judgment as to whether they consider it "expedient" to do so. There are a number of different enforcement 'tools' which the Council can use:

- Planning Contravention Notice (PCN) –served where a breach of planning control is known or suspected, to require more information on activities/ownership.
- Enforcement Notice -requiring steps to be taken to remedy a breach of planning control.
- Stop Notice -requiring a breach to cease immediately.
- Breach of Condition Notice (BCN) -requiring conditions to be complied with.
- Injunction -to restrain any actual or expected breach of planning control.
- "Untidy site" Notice -where the appearance of land is harming local amenity.

Breaches of listed building and advertisement control and damage to protected trees are dealt with under separate procedures, which share some similarities, especially in respect of listed building control. The key differences are that such breaches can also lead to criminal proceedings being brought by the Council. These issues are also dealt with by the Enforcement Team. However specialist advice i.e. (Conservation or the Arboricultural Officer) is also engaged in such cases.

The Government's policy guidance on the use of enforcement powers is largely set out in PPG18, Circular 10/97 and the 1997 publication "Enforcing Planning Control: Good Practice Guide for Local Authorities."

Following recent changes to the Council's Constitution, formulated to speed up formal enforcement action, the Head of Development Services (in consultation with Ward Members) can decide whether to issue an Enforcement or Stop Notice. The Head of Development Services can also authorise Planning Contravention Notices, Breach of Condition Notices, or Untidy Site notices and can instruct the commencement of legal proceedings. Ward Members are consulted when the Council is contemplating issuing an Enforcement Notice. They can still require the matter to be referred to Committee, if they feel there are issues in the case which merit public debate.

The Enforcement Process:

All breaches of planning or other controls over development are potentially serious. In deciding whether enforcement action is expedient, the Council has to ask itself three, fundamental questions:

- Is there an unacceptable effect on amenity/ the use of surrounding land or buildings?
- Would permission be granted?
- Could conditions be imposed to remedy any harm?

The Government has recognized that planning enforcement is labour-intensive. Thorough investigation of the relevant planning history and painstaking evaluation of the facts are vital to underpin effective enforcement. (Enforcing Planning Control: Good Practice Guide 1997).

The principles of good enforcement by local government officers enforcing planning and other legislation are set out in the 'Enforcement Concordat' jointly prepared by the Cabinet Office and the Local Government Association in the late 1990s. The concordat sets out general policies and procedures for enforcement functions which contribute to Best Value.

The Council's general procedures for investigating enforcement enquiries are set out in its policy.

Priorities for Enforcement:

The team endeavours to progress enforcement cases as quickly as possible at every stage. However, not every case can be given top priority at all stages. As part of its enforcement policy, the Enforcement Team evolved priorities for enforcement action, set out in the Enforcement Manual. The priorities for enforcement action are set out at appendix 2 to this report.

Workload/staffing issues:

Members receive a quarterly update of all Committee-authorised cases. Additionally the Quarterly Digest contains a detailed breakdown of the number of enforcement cases received, and the number of cases resolved either through negotiation, obtaining planning permission or formal enforcement action during the quarter.

Analysis of the number of enforcement enquiries received shows that the team's workload is increasing, year by year. The number of enquiries received in 2003 was around 800, compared with the total number of complaints received in 2002 and 2001 (both around 700). This year to date in the first three quarters, the Council has received just under 600 enquiries. Whether this increase in workload is a long-term trend is currently unclear, although it is significant to note that in 1997 the Council dealt with around 400 enforcement enquiries and had the same number of enforcement officer posts at that time.

As already noted above, a permanent post carrying a significant level of responsibility within the team has been vacant for almost a year, notwithstanding attempts to recruit a replacement member of staff. Thus there have been significant periods during the last two years when the team has not been operating at its full staff complement. The Principal Planning Officer (Enforcement) joined the team just over two years ago and inherited a backlog of older, more complex cases, which had previously proved difficult to resolve, partly due to high staff turnover and lack of continuity within the team.

Notwithstanding the above, there has been a significant increase in enforcement activity over the past two years. In 2001, 4 Enforcement Notices (including 1 Stop Notice) and one Breach of Condition Notice were issued. A similar number of Enforcement Notices, with no BCNs at all was issued in 2002. In 2003 however, 11 Enforcement Notices were issued together with 18 BCNs. To date in 2004, 6 Enforcement Notices have been issued, together with 23 BCNs and a Section 215 (Untidy Site) Notice. In two further cases, the breach has been regularized after the Committee resolution to take enforcement action but before the Notice could be issued.

A slight fall in the number of Enforcement Notices issued this year is to be expected due to the cyclical nature of the enforcement process; following issue of the Notice the Council is likely to have to devote further Officer resources to fighting an appeal, most often at a hearing or public inquiry. Preparation for appeals in particular inquiries places considerable demands on Officer resources. Appealing against Enforcement Notices is attractive to offenders because at the very least, it lengthens the time in which they have to comply; indeed one of the most common grounds of appeal pleaded is to extend the period for

compliance with the Notice-even if appeals are dismissed on other grounds Inspectors will extend the period for compliance as the offender is entitled to believe that his appeal will succeed.

As the Planning Inspectorate takes increasingly longer to deal with appeals, lodging an appeal against an Enforcement Notice looks even more attractive to offenders. It increases the delay in bringing enforcement cases to a conclusion, thus perpetuating the harm to amenity whilst seeming to let the developers continue with impunity. The above can add to the public's frustration with the length of the enforcement process is outside of the Council's control.

In addition to the above there has been a considerable increase in enforcement by Court action. Prior to 2002 such action was rarely taken; in 2003 three cases were brought and so far this year six cases in relation to matters such as failure to comply with BCNs, unauthorised works to listed buildings and illegal display of advertisements have been brought, with further cases expected to be heard at Court before the end of the year.

Proactive Enforcement-Compliance Monitoring:

Most enforcement activity by local authorities has traditionally been reactive, i.e. responding to enquiries from members of the public, Parish Council, etc. This is partly been as a result of the lack of resources devoted to enforcement and lack of priority set on it by some Councils. Often by the time a Council becomes aware of a breach, considerable development activity will have taken place and it becomes more difficult to do other than mitigate its worst effects.

Planning Officers, Committees and Parish Councils can spend considerable amounts of time suggesting negotiating changes to ensure development is of a high standard. Conditions are imposed on a planning permission to overcome objections as an alternative to refusing permission. If development is not carried out in accordance with approved plans and conditions, the added value achieved through negotiations is lost, and the character of the area and amenities of local residents is eroded as a result. Therefore it is important that plans and conditions are complied with. The lack of effective enforcement in this regard can not only be damaging to the environment but can also erode the public's confidence in the planning system as a credible method of controlling development and ensuring high standards in new building. It can also encourage further, similar breaches.

In contrast with the reactive approach, best practice (DETR Good Practice Guide) and the experience of other authorities indicates that *proactive* enforcement activity by compliance monitoring results in the earlier detection of potentially serious breaches and in many cases increases the likelihood of early resolution without the need for long, drawn out enforcement action. This in turn results a more efficient and effective enforcement service, but requires staff resources to make it work.

The ODPM's consultation paper on review of the enforcement system published in late 2002 recognised that most Councils assigned compliance monitoring relatively low priority, however procedures for monitoring conditions needed to be developed to ensure effective enforcement.

In responding to the ODPM's paper, the Council's Cabinet agreed with Officer impressions that Area Committee and Parish Councils perceived growing problem of instances where developments are not being constructed in accordance with approved plans or without compliance with conditions. As noted above, this can result in the erosion of the quality of development and can leave the Council facing a *fait accompli*.

In January 2004, Cabinet therefore authorised the Head of Development Services to recruit a compliance officer, who commenced work in April. The Compliance Officer routinely checks Building Control information and cross –references it with information on the planning files. Developments are checked at key stages in the development process to ascertain compliance with approved plans and conditions, in accordance with a scale of priorities. Routine checking whether development is proceeding on site in accordance with the approved plans also takes place.

If it is established that the approved plans are not being complied with, the development will be entirely unauthorised and any conditions would not apply. If the breach caused demonstrable harm, formal enforcement action would then be necessary.

If it is established that precedent conditions have not been complied with, a Breach of Condition Notice (BCN) will usually be served on the persons responsible (normally the developer)

A similar process to the above is followed if it is subsequently established that development is continuing in breach of other conditions which 'bite ' on the development at later stages in the development process.

Section 106 Obligations are used alongside planning permissions to secure important benefits in the public interest which could not reasonably be secured by imposing planning conditions, and embrace matters such as such as affordable housing or capital contributions to recreational provision. It is important that the community benefits of affordable housing, community facilities, public open space, road improvements, green travel plans and other matters negotiated and secured through Section 106 agreements are finally and fully realised in the development undertaken and are done so in a timely manner. Particularly with larger and more complex developments, the 'triggers' for complying with such agreements can occur at various stages during the construction process and can span over several years as for example, a set number of houses are completed. In addition in relation to issues such as affordable housing there is a requirement for long term monitoring, for example to ensure that the dwellings remain occupied by persons genuinely in need of affordable housing. Green travel plans also raise particular difficulties in terms of detecting breaches and enforcing compliance and require continuing monitoring on a long-term basis.

Obligations are now monitored in accordance with the same procedures for conditions set out at above. Liaison between different services will be required, to ensure that their respective requirements have been met. If a breach of the Obligation is established, the developer is at risk of immediate enforcement action by the Council initiating injunctive proceedings in the Courts. If such a breach is established, a 'letter before action 'would then be sent to the applicant. This will require them to undertake to comply with the terms of the Obligation within a certain time period, or face injunctive proceedings in the Courts to require them to cease the development. If the Obligation is not honoured in response to the letter before action legal proceedings will be commenced.

Proactive Enforcement- Prosecution:

This is another tool used to remedy the breach; as already noted above it cannot be used as a purely punitive measure. Whether to bring prosecution proceedings involves a measure of judgment as to whether there is a public interest in bringing them; for example it would not be appropriate to prosecute a case involving relatively minor matters or matters which are likely to be remedied through a grant of consent. On more serious cases however, for example the demolition of a listed building or failure to comply with a Breach of Condition Notice, there is clearly a public interest in bringing proceedings.

Nevertheless, Officers see prosecution as another part of the proactive approach to enforcement, not only because it will quickly focus the offender on remedying the breach due to the potential for them to incur a financial penalty (and perhaps no less importantly, a criminal record) but also due to the 'deterrent' effect that bringing cases to Court has on the offender as well as other developers and person/organisations contemplating similar offences and/or breaches of planning control.

Since the beginning of 2004 the Enforcement Team have in conjunction with Legal and Property Services have therefore pursued a more robust approach to prosecuting offences in relation to:

- Failure to comply with Enforcement Notices.
- Continued display of advertisements without consent;
- Failure to comply with BCNs.
- Breaches of listed building control;

A number of cases have been brought to court and several more are due to come to Court in the coming months. As the Magistrates become more familiar with the issues and the number of cases increases, the level of fines (within the constraints of the level of fine that the Court can impose for such offences) have generally reflected a growing awareness of the seriousness of such matters.

As noted above, in cases where compliance has only been achieved with a BCN following the instigating of criminal proceedings, the case has generally continued to Court, due to the 'deterrent' effect that conviction has on the offender and others.

The following cases are examples of this approach:

- *Grove Arms Hotel, Ludwell* –failure to comply with Breach of Condition Notice. Developer convicted and fined. Conditions subsequently complied with.
- *20-22 High Street, Amesbury*- failure to comply with Breach of Condition Notice. Developer convicted and fined. Conditions subsequently complied with.
- *Advance sign on A303, Willoughby Hedge* –repeated display of signage without consent. Negotiations – sign removed and then replaced at a later date. Person responsible for displaying sign convicted and fined. Sign removed prior to Court date. No further occurrences of display of signs.
- *Two A boards displayed on A350, Semley* – repeated display of signage without consent. 2 persons convicted and fined for displaying A boards. Signs removed prior to Court date. No further occurrences of display of signs.
- *51 Blue Boar Row/1 Endless Street* –alterations to listed buildings without consent. 2 persons convicted and fined. Offending sign removed in part.
- *Land at rear of Fairview, New Road, Landford* –breach of Enforcement Notice relating to storage and parking of vehicles on land in the countryside within the New Forest Heritage Area. 2 persons convicted and fined. Vehicles removed and breach remedied prior to the hearing.

- *Land at High Street/Back Lane, Maiden Bradley*- breach of Breach of Condition Notice. Company fined and Director convicted. Notice complied with in part prior to proceedings. Work ongoing to comply with the Notice requirements.

In addition to the fines levied, the Council has recovered costs incurred in bringing the proceedings from the offenders.

Further to the above, some other cases (such as the mmO2 mast at Spire Car Sales, Firsdown) have been resolved following the instigation of Court proceedings, without the case actually being pursued to Court. Administering a caution and obtaining information by conducting a taped interview under the provisions of PACE, has also been effective in conveying to offenders the seriousness with which the Council is now treating offences committed under planning legislation.

In listing the advantages of bringing such proceedings, Members should also be aware that bringing a case to court involves considerable amounts of Officer time, even where a relatively simple case is involved. This is due to the formal requirements for evidence gathering and presentation, bearing in mind that the criminal burden of proof of 'beyond reasonable doubt' will have to be established for a case to succeed. Also, the length of time until the case is heard is at the Court's discretion. Nevertheless it is considered that the wider benefits in terms of publicising the Council's lack of tolerance to breaches of planning control and willingness to pursue offences to court where necessary, merits such action being pursued.

Outcomes:

The Compliance Officer has only been in post for just over six months and it is too early to draw firm conclusions. However the new proactive approach to enforcement has already had positive benefits:

- Earlier detection and remedying of breaches;
- More BCNs issued;
- Earlier compliance with conditions;
- Increased awareness of enforcement activity.

Additionally the increased emphasis on the prosecution of offences to achieve compliance has resulted in several fines with the Council recovering part of its costs of bringing the proceedings, and has also promoted the message that the Council is not tolerant of offences committed under planning legislation.

Conclusion:

The proactive approach to enforcement embraces two, related elements:

- Monitoring compliance with approved plans, conditions and Section 106 Obligations.
- Taking a more robust stance in relation to offences committed under planning legislation and prosecuting offenders where it is in the public interest to do so.

Both are now routinely used to ensure that the development permitted by the Council is that which gets built, and that where offences are committed, the community can have confidence that the Council will use legislative powers to ensure that such offences are remedied if possible and/or that similar offences are not committed in future. The recent changes in the scheme of delegation can only serve to enhance the speed and effectiveness of the Council's enforcement function.

Recommendation:

That the Committee note the report.

Background Papers:

- “Review of the Planning Enforcement System in England” consultation paper published by the OPDM 2002;
- PPG18;
- Circular 10/97;
- Enforcing Planning Control: Good Practice Guide For Local Authorities” published by DETR 1997.
- SDC Enforcing Planning Control Policy Document.
- SDC Enforcement Manual.

Implications:

- Financial: None. Set out in the report.
- Legal: Set out in the report.
- Human Rights: This report does not have any direct Human Rights implications for any party. Any interference in individual Article 8 and Article 1, Protocol 1 rights would be proportional and in the public interest.
- Council's Core Values: Protection of the environment; fairness and equality; open learning Council.
- Ward(s) Affected: All

The General Approach to Enforcement

Nothing in this Note should be taken as condoning a wilful breach of planning law. LPAs have a general discretion to take enforcement action, when they regard it as expedient. They should be guided by the following considerations:-

- (1) Parliament has given LPAs the primary responsibility for taking whatever enforcement action may be necessary, in the public interest, in their administrative area (the private citizen cannot initiate planning enforcement action);
- (2) The Commissioner for Local Administration (the local ombudsman) has held, in a number of investigated cases, that there is “maladministration” if the authority fail to take effective enforcement action which was plainly necessary and has occasionally recommended a compensatory payment to the complainant for the consequent injustice;
- (3) In considering any enforcement action, the decisive issue for the LPA should be whether the breach of control would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest;
- (4) Enforcement action should always be commensurate with the breach of planning control to which it relates (for example, it is usually inappropriate to take formal enforcement action against a trivial or technical breach of control which causes no harm to amenity in the locality of the site); and

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- (5) Where the LPA's initial attempt to persuade the owner or occupier of the site voluntarily to remedy the harmful effects of unauthorised development fails, 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. (LPAs should bear in mind the statutory time limits for taking enforcement action).