

Towards a pro-active enforcement service: making the most of the tools in the box



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Introduction

PAS, in conjunction with NAPE, has produced an advice note on 4 tools in the enforcement tool box. This note is not suggesting these are the only useful tools available to enforcement officers. We do focus on them as a means of being more proactive, and hopefully helping enforcement to achieve greater exposure in a council. Resources are tight for every council, and so it is essential that enforcement is not seen as a purely reactive or regulatory function. We believe this note can help highlight the positive work that enforcement can bring, in helping to deliver council priorities as well as protecting prized community assets.

Our work follows on from the UWE/NAPE report - Planning Enforcement England: At The Crossroads published in December 2014 which contained several recommendations. These included greater use of three available tools:

Enforcement Plans – These are essential requirements for a robust planning enforcement service. Where these are not in place, this should be prioritised.

Start notices – Start Notices should be introduced in association with all planning permissions. A simple notice sent in to local authorities will support compliance and monitoring activities.

In conversation with NAPE we have also used this note to discuss the potential for greater use of the Proceeds of Crime Act (POCA).

The note is published as a draft, to invite comments on content, and to offer examples of work in your councils which we can use to highlight certain points and issues. Please send any comments to adam.dodgshon@local.gov.uk or pas@local.gov.uk

Enforcement Plans

Context

Whilst the NPPF (Para 207) says that “local planning authorities should consider publishing a local enforcement plan to manage enforcement proactively”, there is no definition of what one is, or any guidance on how to develop and maintain one. This note seeks to provide advice on the purpose, content and use of enforcement plans. Whilst we offer some thoughts on how one might look, these are nothing more than suggestions, and each authority should consider developing one in the way best suited to their circumstances.

We have to see enforcement as part of the “end to end process” of development from policy through to monitoring and getting compliance without taking any enforcement action. After the grant of planning permission the law only has enforcement powers and these can only be used when it is deemed “expedient” to do so.

Most councils will have produced a ‘Corporate Enforcement Policy’ document. This will set out the overall scope and purpose of enforcement policy for the council. Whilst they are also likely to refer to planning enforcement as a separate activity, it is useful to remember the core principles, namely: Proportionality; Openness; Helpfulness; Clarity; Consistency; Suitable Action; Human Rights; Equality. These principles are also at the core of the judgment of ‘expediency’.

An enforcement plan should be seen as the direct link to planning policy. The status of the enforcement plan is not set down anywhere. Local Planning Authorities (LPAs) should seek to adopt their enforcement plans in the way which suits their purposes best. This could be as formal as a supplementary planning document, or something ‘lighter touch’, as with other corporate plans. However, to be most effective, engaging with end users as well as with officers in the council will give the adopted plan more ‘weight’.

Involvement of Members will also be crucial to developing an effective enforcement plan. Members often have to be the public face of the council when faced with issues which may require enforcement. Having an adopted enforcement plan to refer to should provide Members with more confidence, as well as providing end users with more transparency and consistency.

An enforcement plan which has had the involvement of Members and senior management is also likely to be able to be used to support the service. When resources are tight, non-statutory elements tend to get cut. Some senior managers seem to think that planning enforcement per se is discretionary, but investigating an alleged breach of planning control is not; somebody, somewhere in the Council has to do it. Similarly, making an assessment of expediency is not discretionary. Lack of resources might be mitigating circumstances but will not be a defence to an Ombudsman investigation or a Judicial Review. As the NPPF recognises, ‘discretion’ is what follows from the expediency decision. Most Councils have a document which explains their enforcement processes with titles such as: Enforcement Charter, Protocol, Policy etc.

Many of these documents contain no policies and very few consider how the LPA monitors compliance with permissions. Generally, they are descriptive: how complaints are handled and prioritised to maximise use of scarce resources, how allegations are investigated, what the expediency tests are and a long list of enforcement powers that might be used (but rarely are in some LPAs). Often they are one-sided, managing the expectations of the complainant and of little help to those who might be the subject of an investigation.

It is not mandatory to have an enforcement plan. A Council could say that the necessary policies are in its statutory Local Plan (or will be). It could decide that it does not intend to produce an enforcement plan, but more often the absence of a plan happens by default.

NPPF Para 207 tells us that the purpose of a local enforcement plan is to show how a LPA will “manage enforcement proactively” in a way which is appropriate for them; so plans could be quite diverse. In keeping with localism, there is no advice about the form or status of this plan, but we are told (as a minimum) what subjects the plan should cover. They should show how:

- the implementation of planning permissions are monitored
- alleged breaches of unauthorised development are investigated
- “action” is taken when appropriate.

Suggested content:

An enforcement plan should not be a long document and it could encompass the existing procedural charters, protocols etc. The plan ought to have policies about what should be happening after the permission has been granted; the “faithful” delivery of what the Council approved, the engendering of a “compliance culture”, their approach to resolving breaches of planning control as well as maintaining the integrity of the process by not delaying enforcement action when it is expedient. It needs to be a document in which all the elements get equal weight. Above all enforcement plans should be flexible and giving shifting priorities may have to be reviewed on a regular basis

Each of the elements below can be succinctly set out and should be clear and easy to read. The plan will be used not only by internal staff and Members, but also by the general public.

This section sets out what we believe an enforcement plan should cover. We also illustrate it with examples from existing documents where possible.

An Enforcement Plan should:

- Be clearly linked and explained in the Local Plan
- Set out clear service standards for investigating alleged breaches including performance indicators, prioritisation and monitoring
- Explicitly support the ‘themes’ of the Local Plan
- Also include and be clear about the need for compliance
- Consider having a section on ‘projects’ where there is member buy in on pro-active enforcement - this is likely to be reviewed regularly as priorities change

- Consider whether some form of chargeable services could work or at least be clear that referral to a chargeable pre-app service is the policy for rectifying appropriate breaches and that the planning enforcement case officer will be in attendance
- Contain appendices and glossaries to demystify service if necessary

Linking to the local plan

The London Borough of Lambeth's has a policy in their local plan regarding enforcement. This policy is good because it leaves the detail for the enforcement plan (in this case the protocol) but sets out well the compliance and enforcement theme as well as the policy role. The enforcement plan can refer to the link to Article 4 directions especially where these have been informed by enforcement action. This then hooks in the protocol into the development plan and allows it to be updated as regularly as they want during the local plan's lifetime.

Lambeth Council policy on Enforcement:

- (a) The council will investigate reported breaches of planning control in accordance with its planning enforcement protocol. Cases will be prioritised according to the harm to amenity caused and resources available. Investigations will be carried out proportionately in relation to the breach of planning control identified.*
- (b) Where informal negotiations fail to resolve the identified breach of planning control, and where it is considered appropriate and expedient to do so having regard to the provisions of the development plan and any other material considerations, formal action will be taken.*

It is possible that the 'planning enforcement protocol' could be a substitute for the enforcement plan, if it covers the themes we suggest.

Service standards, prioritisation and monitoring

This section of the plan should set out clearly what people can expect from the council when there is an alleged breach.

The Wychavon District Council Local Enforcement Plan of 2013 provides this following list:

We will:-

- Investigate all alleged breaches of planning control reported to the council either in writing, by e mail, by telephone or in person;*
- Keep your personal details confidential at all times, unless required to disclose as part of court proceedings;*
- Register your complaint within 5 working days, providing you with an acknowledgement and reference number with a named officer as the point of contact;*
- Keep you informed of the progress of the case and of any decisions made with regard to whether to take action or of what action will be taken and likely timescales involved;*
- Actively pursue your complaint to a satisfactory conclusion;*

- *Investigations into alleged breaches of planning control may take some time however we will seek to close 80% of all cases within 12 weeks from the date of receipt;*
- *In cases where there may be a technical breach of planning control but the harm caused is insufficient to warrant formal action notify you of the reason for not taking formal action and close the case;*
- *Negotiate with those responsible for any breach of planning control, allowing them the opportunity to resolve the matters of concern before serving a formal notice unless the breach is so serious it warrants immediate action or where negotiations become protracted with no real likelihood of success.*

This neatly summarises everything a member of the public can expect of the council, including timescales and targets.

Such targets should be reflected in a section of the Council's Authority Monitoring Report and reported on annually. This will help ensure the profile of the service is retained within the council. We would also suggest that you consider including a few simple survey questions as part of an annual survey into the quality of the service (linked to surveys on quality of development management).

If there are certain local priorities then it would be useful to reflect them in this section.

Supporting the themes of local plan

The themes of the local plan could be set out in the enforcement plan as this is what it is depending on. Almost all core strategies will mention sustainable development, managing growth, a good place to live, health and prosperity, not necessarily in those words or order.

Enforcement should be seen as contributing to the delivery of these objectives. Having enforcement officers involved in local plan preparation, helping to both explain and understand how their actions contribute to these themes, can help ensure the service is seen as more a proactive one.

Enforcement officers should be a part of the conversation about plan policies, to make sure they are clear and enforceable.

The need for compliance

Compliance in general including compliance with outstanding planning conditions should not be lost sight of. With deemed discharge of condition notices and the requirement of Local Planning Authorities (LPAs) to justify imposing pre-commencement conditions LPAs will need to be proactive in practice about how such conditions can be minimised with more frontloading of information at the application stage. This is reliant on the LPA's willingness to enforce breaches of condition.

Wokingham District Council's Local Planning Enforcement Plan (LPEP) 2015 contains a simple table setting out the different types of enforcement action and purpose of each.

<i>Type of enforcement action</i>	<i>Purpose</i>
<i>Planning Contravention Notice</i>	<i>Requires persons to divulge information in respect of land and activities. This is often under-taken to determine if there is a breach of control and to inform the appropriate course of action</i>
<i>Breach of Condition Notice</i>	<i>To secure compliance with conditions specified within a planning permission</i>
<i>Enforcement Notice</i>	<i>To require steps to be taken to remedy the breach of planning control</i>
<i>Stop Notice / Temporary Stop Notice</i>	<i>To require the unauthorised activities to cease</i>
<i>Section 215 Notice</i>	<i>To secure the proper maintenance of land and buildings</i>
<i>Injunctions</i>	<i>To prevent unauthorised development and only used in a very limited number of specific circumstances</i>
<i>Prosecution</i>	<i>Failure to comply with a notice is a criminal offence. To secure compliance with any formal enforcement notice and / or to bring the offence before the court for its consideration and, if convicted, sentence including ancillary Orders</i>

Projects and priorities

This is where senior officer and Member buy in is crucial. The council may identify priority areas where proactive enforcement could really benefit. For example, joint action on improving the local high street with generic enforcement, or ‘beds in sheds’ with environmental health or a Conservation Area project to coincide with the making of an Article 4 direction. Having these projects listed in the enforcement plan would also represent the best chance of getting funding for specific projects which can be publicised, with the ‘core’ team (or officer) maintained for the day to day.

Some of the plans we have looked at have picked up the need to prioritise work generally. Categorising work into three different priority groups seems to work well. The Wokingham Local Planning Enforcement Plan 2015 provides the categories and level of service that can be expected.

<i>Category</i>	<i>Type of development</i>	<i>Level of service</i>
<i>Category 1 – High priority</i>	<i>When irreversible and serious damage to the environment or public amenity would result. Examples include works to protected trees; works affecting the character of a listed building; demolition works in a conservation area; serious traffic hazards; contamination and or pollution being created, unauthorised caravan sites, or other development where there is actual or imminent residential occupation.</i>	<i>Receive immediate attention, where possible the same day; where this is not possible, within one working day. The planning enforcement team may be required to devote all of its time to the investigation of one category 1 complaint depending on its nature, but in normal circumstances will be able to address more than one complaint of this nature at any given time.</i>
<i>Category 2 – Medium priority</i>	<i>This covers less immediate yet still serious and harmful breaches and is likely to include breaches where building works have just commenced, where severe harm is being created and non-compliance with certain planning conditions (particularly pre-commencement conditions).</i>	<i>The complaint will normally be investigated within 10 working days of the complaint being received.</i>
<i>Category 3 – Low priority</i>	<i>This category relates to breaches that are likely to remain stable and that are unlikely to give rise to any severe or lasting harm to amenities. Such breaches may include untidy sites, non-compliance with other planning conditions, erection of satellite dishes, the unauthorised display of advertisements and the erection of fences.</i>	<i>The complaint will normally be investigated within 28 working days of the complaint being received.</i>

However, this does not pick up the point about a locally specific priority which ought to be tackled using the enforcement plan. In this way, not only is the plan monitored, it is also kept up to date. It can be refreshed when new priorities emerge, as well as heralded when existing priorities are tackled.

Fenland District Council embarked on a Heritage Lottery Fund Bid to check the decline of some of the historic buildings on Wisbech High Street. You can read more about it here <http://www.fenland.gov.uk/wisbechhighstreet>

Whilst not part of an enforcement plan in Fenland at present, we suggest this kind of project could gain further traction if it was incorporated into such a plan. It would highlight the proactive nature of the service and help to promote it, along with the actual benefits achieved by delivering the project.

Potential for chargeable services

An enforcement plan can and should involve some content on income generation and if possible how that is recycled back into the development management function or directly to the planning enforcement service. The Proceeds of Crime Act (POCA) is potentially where large sums of money can be obtained. However, surprisingly large amounts can be raised through investigations that result in retrospective planning applications and Lawful Development Certificates, appeal fees and costs, prosecution and caution costs and recovered cost from direct action.

Another item on this theme which can and should be in an enforcement plan is some sort of chargeable enforcement service. The Royal Borough of Kensington and Chelsea have a service for withdrawing Enforcement Notices (which may be old or irrelevant with action not in the public interest). Enforcement administration teams get a lot of enquiries from potential house buyers and sellers and give information for free. LPAs should consider charging for this service in the same way as other charges for development management advice outside of dealing with applications.

Most importantly however is that the only potential for the recovery of costs are at the appeal and prosecution stages. Whilst the top priority is to achieve satisfactory compliance where harm occurs, where advice is consistently ignored and an Enforcement Notice has been served, we feel there is scope for a bespoke service for compliance which seeks to recover its costs. At the very least an enforcement plan should make clear the willingness of referral of breaches where appropriate to the chargeable pre-application service, where such meetings should include a planning enforcement officer.

Use of appendices and glossaries

As with any planning document, there is a risk that jargon gets in the way of the clarity of advice. Given that the enforcement plan is expected to be used by the public, jargon should be avoided where possible. However, rather than breaking the flow by constantly referring to the meaning of terms most commonly used in enforcement, a simple glossary or appendices showing

flow charts of processes, and definitions of key terms, will be really useful. It will also make the document much easier to read.

Proceeds of Crime Act (POCA) in Planning – A short guide

Introduction

Powers to confiscate criminals' benefit from crime were originally introduced to reclaim drug trafficking proceeds, and were extended by the Criminal Justice Act 1988 to cover non-drug indictable offences and specified summary offences.

The Proceeds of Crime Act of 2002 ("POCA") consolidated these acts. It provides a robust set of powers for investigating, restraining and confiscating assets that have been acquired as a result of criminal activities. The court calculates the value of that benefit and orders the offender to pay an equivalent sum (or less where a lower sum is available for confiscation). In certain circumstances the court is empowered to assume that the defendant's assets, and income and expenditure during the period of six years before proceedings were brought, have been derived from criminal conduct and to calculate the confiscation order accordingly.

With a few exceptions, a breach of planning control is generally not a criminal offence, but such activities can become criminal where they continue to occur in breach of a valid effective enforcement notice. If the notice is not complied with then the LPA has a number of statutory remedies it can rely on, including prosecutions and direct action.

The threat of a criminal sanction in itself may encourage compliance. Where compliance is not achieved, the planning criminal is punished with a criminal conviction. Utilising confiscation orders under POCA goes even further, in that not only does forfeiting the profits attributable to the planning breaches punish the offender, but the local authority also receives a share of those profits. Using careful judgement and thorough investigation, local authorities can use this tool to target known repeat offenders, creating a real deterrent against breaches of planning law, while at the same time recovering sums to cover costs. This provides a useful tool towards making planning enforcement self-funding.

Proceeding with POCA

The type of offences for which POCA may be appropriate, are:

- Flat conversions
- Advertisement hoardings
- Listed Buildings offences
- Landfill sites

This is of course not an exhaustive list.

Following conviction of a planning criminal in the Crown Court, the LPA can ask the court to proceed under s.6 of POCA.

The prosecutor will then provide a statement of information in accordance with s.16. This statement is provided by the financial investigator and will include (amongst other things)

- an overview of the offences committed and the details of the conviction, timetable for confiscation and any sentences that have been passed.
- Details of the defendant such as age, address, marital status, occupation, income and any previous convictions.
- The extent of the benefit derived from the said offences and details of conduct at trial including any guilty pleas, admissions and sentencing remarks.
- Whether the matter is one of general criminal conduct or a lifestyle offence.
- The nature of any assets which are realisable (including whether there is an allegation of any hidden assets and the basis for such a belief)
- The amount of the confiscation order that the prosecutor is seeking.

The court will use the Statement of Information to ascertain whether the case is a particular or general criminal conduct matter. If it is a particular criminal conduct matter, then assumptions from s.10 (see 'Criminal Lifestyle' section) will not apply, but the assumptions will apply if it is a general criminal conduct matter or a lifestyle offence.

Note that you do not need to be able to prove a 'criminal lifestyle' (and therefore the minimum amount of benefit, etc.) in order to proceed with seeking a confiscation order. It is however likely to be more financially advantageous for an LPA to seek confiscation orders where a criminal lifestyle can be proven.

Criminal Lifestyle

Criminal lifestyle (s.75) – the offence must satisfy one or more of these tests:

1. it is specified in schedule 2;
2. it constitutes conduct forming part of a course of criminal activity; and/or
3. it is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence.

Planning offences are not included in schedule 2, but the other two tests can easily apply.

A course of criminal activity has been committed where an offender:

- has been convicted in the current proceedings of four or more offences on the same occasion, each of those offences having been committed after 23 March 2003 and from which he or she has benefited; or
- has been convicted of one offence committed after 23 March 2003 from which he or she has benefited on this occasion and within six years of the start of the most recent proceedings been convicted on at least two separate occasions of an offence, which may have been committed before or after 23 March 2003 and from which he or she has benefited.

Note that the criminal lifestyle test is not satisfied unless the defendant has obtained benefit of at least £5,000 in the cases of (2) and (3), however, the value of any benefit in respect of offences started on or after 24 March 2003 will count towards this sum.

s.10 assumptions

If the court finds the defendant has a criminal lifestyle, then unless there is a serious risk of injustice, the following four assumptions apply:

1. any property (all free property wherever situated and includes money; all forms of real or personal property; and things in action and other intangible or incorporeal property) transferred to the defendant at any time with the previous 6 years was obtained by him as a result of his general criminal conduct and at the earliest time he or she appears to have held it;
2. any property held by the defendant at any time after the date of conviction was obtained by him or her as a result of his or her general criminal conduct or at the earliest time he or she appears to have held it; and
3. any expenditure incurred by the defendant at any time in the last 6 years was met from property obtained by him or her as a result of his or her general criminal conduct, and
4. for the purpose of valuing any property obtained or assumed to have been obtained by the defendant, he or she obtained it free of any other interests in it.

The court has to make these assumptions once it has decided that the defendant has a criminal lifestyle but should not make them if it thinks that there will be a serious risk of injustice. The court will have regard to human rights implications in determining this risk.

The need to observe these provisions was established in *R v Waya (Appellant)* [2012] UKSC 51. The risk is already safeguarded by s.10(6) of POCA which states that the court must not make an assumption if there is a serious risk of injustice, but the case explicitly stresses this.

If the court doesn't make any assumptions, a record of the reasons why must be given.

The defendant must respond to the Statement of Information and the prosecutor may serve further statements of information. The court can order the defendant to provide further information.

Assessing the recoverable amount

Once the Court has decided that the defendant has benefited from general criminal or particular criminal conduct, it must assess the recoverable amount, which should be equal to the benefit from the conduct concerned. If the defendant proves that the available amount is less than the benefit accrued or is nil, then the recoverable amount will be assessed as the available or a nominal amount if the amount available is nil.

Once the amount is assessed, the court will make a confiscation order, which is payable immediately or within 6 months where time is needed to realise funds from specific assets, such as property. The court also has powers to make a compliance order which could be used to require the sale of specific assets or in cases where it is suspected the defendant will pass funds out of the jurisdiction, the requirement to surrender passports and impose a travel ban. This may be a helpful tool where it is thought the defendant might opt to take a prison sentence rather than pay the money.

Interest at 8% is payable on the outstanding balance of the Confiscation Order from the date on which it is due to be paid.

Following payment of the Confiscation Order, it is divided out as follows:

- 50% - to the Government
- 18.75% - to the prosecuting authority
- 18.75% - to the investigating authority
- 12.5% to the HM Court Service

This means that LPAs could receive up to 37.5% of the proceeds where they are both the prosecuting and investigating authority.

Where confiscation orders are not paid, the Court could hand down default sentences:

- For orders of £10,000 or less the maximum prison term is 6 months;
- For £10,000 - £500,000 the maximum term is 5 years;
- For £500,000 - £1m the maximum term is 7 years and anything over £1m is 14 years.

Seeking confiscation orders for planning offences can provide multiple benefits to local planning authorities: planning offenders are punished, the planning offenders are incentivised to comply with planning laws, would be planning offenders are deterred, and local planning authorities can attain a financial benefit in order to continue to fund this important service.

Voluntary Start Notices

Introduction

At present a developer is not required to notify the Local Planning Authority (LPA) before development for which planning permission has been granted is commenced. As such there is no method of checking if conditions, especially pre-commencement conditions, have been complied with.

Whilst it may be possible to cross reference Building Control commencement reports this is time consuming and relies on the report being accurate; where a private inspector is used then this may not show up on any report.

A survey carried out by one LPA showed that there was a very low rate of compliance with condition on minor applications.

We suggest therefore that LPAs should encourage the use of voluntary start notices where planning permission has been granted and where that permission contains conditions which are pre-commencement or which control the development whilst it is being carried out.

Start notices aren't required where the permission is unconditional or contains conditions such as "materials of external construction shall be a match for those used on the existing dwellinghouse."

The start notice should be sent to the applicant rather than the agent. That way they will know that there are conditions on the application which need to be complied with.

Sample letter

A suggested format for the letter and notice is shown below:

I refer to the planning application submitted by you or on your behalf relating to the development detailed above and the recent decision to grant planning permission. When planning permission is granted, it is your responsibility to ensure that the development is constructed in complete accordance with the approved plans and details. You must also ensure that all conditions applied to the consent are complied with. If any of the conditions require further approval and/or the submission of further details before development starts or use begins (known as pre-commencement planning conditions), the requirements of the condition(s) must be satisfied before a start is made. Failure to construct the development in complete accordance with the approved plans and / or failure to comply with these types of condition may make either the permission null and void or the development unauthorised.

In order to satisfy the requirements of a condition, you should write, enclosing the necessary information, submission fee; currently £97 (£28 for domestic extensions), and specifying the address of the site, planning application number and reference number of the condition(s) in question. Alternatively, you may use the application form available from the above address which also appears on the Council website.

It is important, therefore, that you read the Decision Notice carefully and ensure that the development is being constructed in accordance with the plans and detail listed in the decision. If necessary, make contact with [insert case officer] at the council to seek

guidance on how to ensure compliance. Please note that if you wish to make changes to the proposal you may need to submit a new application. The officer referred to above dealt with your application and will be the first point of contact to assist you in these matters.

In addition I would ask that you give advance notice to this office on the tear off slip below, of the date when work is to commence on the implementation of the planning permission.

Yours sincerely
Chief Planning Officer

.....#.....Please complete and forward to address at the top of this letter.

PLEASE NOTE THAT IT IS PROPOSED TO COMMENCE THE DEVELOPMENT INDICATED BELOW:

ON THE* (Insert the date of commencement of the development providing at least 2 working days notice)

CONTACT: *.....

*Insert contact details of the person or organisation responsible for carrying out the work

LOCATION:

REFERENCE:

PROPOSAL

Benefits

Whilst the capacity to deal with start notices may be cause for concern, we feel that by being selective about the developers the notice is sent to, this process can easily be managed as part of the overall application handling. These notices will draw attention to the need to comply with conditions and ensure that the development is in accordance with the approved plans.

Whilst the notices are voluntary LPA's find that using them results in a high return rate. We suggest that any returned notices are first sent to the planning officer who determined the application. They can then check the application to see if conditions have been discharged. If not the, contact the developer and require them to discharge the conditions.

If there are any concerns over the development or it is sensitive then the file can be passed to the monitoring officer/enforcement team.

The use of notices has been shown to be an effective tool to ensure that development is carried out in accordance with the approved plans, and that all conditions are discharged.

Start Notices are compulsory in Scotland and NAPE has previously suggest an amendment (via the Localism Act) to the Town & Country Planning Act making the submission of such notices compulsory.