NAPE Enforcement Handbook

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RTPI
Royal Town Planning Institute

PLANNING ENFORCEMENT HANDBOOK

For England

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The NAPE Management Committee would like to thank all those who have contributed to this handbook and the RTPI for its continued support of NAPE.

This handbook will continue to be reviewed and updated by NAPE Management Committee members.

This handbook applies to England only. The law in Wales is different in many important respects.

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Foreword

Planning enforcement, often thought of as the ‘Cinderella’ of the planning service, is key to ensuring local and national policies are upheld and adhered to. Planning enforcement ensures that the entire planning process, from plan making to development management, is effective and delivers what it says it will, when it says it will.

At the heart of the planning process, planning enforcement professionals tirelessly promote and uphold local and national policies and ensure that anybody who flouts planning control is brought to account. Those professionals are often over worked and under resourced, but it is their passion for ensuring that planning control is adhered to which enables plan makers and planning officers to make confident decisions and to see their vision of making our places, environment, and quality of life better, come to fruition.

Planning enforcement has never seen changes like those introduced under the Levelling Up and Regeneration Act 2024 (LURA) in April 2024. The ‘toolkit’ has expanded, and powers have been increased. Penalties for flouting planning control have been strengthened and it has become harder to play the system, which has been the thorn in the side of many officers’ workload for some time now.

Local Planning Authorities are encouraged to embrace the changes and ensure that their officers are afforded autonomy to take action where appropriate and expedient to do so. It is hoped that this Enforcement Handbook, with updates addressing the LURA changes, will empower planning enforcement professionals to take such action and will champion this vital component of the planning process.

I am delighted to have been involved in planning enforcement during a period of such drastic and exciting changes. I believe that 2024 will be a new dawn for planning enforcement and the planning system and I am excited to continue to work with and support Local Planning Authorities through my role as Chair of NAPE.

Olivia Stapleford

Chair, NAPE 2024

Introduction

Parliament has given Local Planning Authorities (LPAs) the primary responsibility for taking whatever enforcement action they consider necessary in the public interest in their area.

Enforcement action is discretionary, however an LPA's duty to investigate an alleged breach of planning control is not. As set out within the National Planning Policy Framework, LPAs should consider publishing a Local Enforcement Plan to manage enforcement proactively, in a way that is appropriate to their area. NAPE strongly advocates for the adoption of Local Enforcement Plans which will assist LPAs in the prioritisation, consideration and determination of enforcement cases.

Enforcement action is intended to be remedial rather than punitive and should always be commensurate with the breach of planning control to which it relates. All enforcement cases should be investigated properly, and the following key questions answered: Is there development? Is there a breach? Can the breach be resolved through negotiation? Is the breach causing harm? Is enforcement expedient? Any decisions made should be accompanied by a report addressing all of the issues and kept on file.

Negotiation is a key skill of any enforcement officer and in the majority of cases breaches can be resolved through this process. However, as soon as it becomes clear that a breach cannot be resolved amicably, and that there is ongoing planning-related harm that is contrary to the public interest, enforcement officers should not be afraid to use their enforcement powers to remedy the breach.

The aim of this handbook is to guide planning enforcement officers in England towards the correct decision, whether this be taking formal enforcement action or taking no action at all. Whatever the decision, there must be an auditable trail of officers' actions; based upon the law, government guidance and the evidence available.

The Handbook is not written as a substitute for official publications, nor does it give hard and fast rules or specific legal advice. It is not a substitute for formal training or in-depth research, discussion and consideration of what can be complex issues.

The handbook has been updated in April 2024 for the package of enforcement measures included in the Levelling Up and Regeneration Act 2023 which come into force on 25 April 2024. The updated text was completed without sight of the subsidiary regulations and transitional provisions but with the benefit of a DLUHC summary of their expected contents; care must be taken to read the final regulations. There are additional changes, such as completion notices which will come into force at a later date.

I am grateful to the updating team, which included Izindi Visagie, Roderick Morton, Daniel Slade and Madeleine Pauker.

Olivia Stapleford, NAPE Chairman

April 2024

Section 1: Gathering information

1.1 Sources of Information (Neill Whittaker, Ivy Legal)

A plethora of online information is available to enforcement officers by simply searching for an individual's name or address in a search engine tool. This method of information gathering can reveal relevant publicly available information which can form part of an enforcement investigation or appeal.

When utilising information from other records however, officers should always ensure to comply with the Data Protection and Freedom of Information Acts. These sources should not be used to provide information to third parties, including to the public. Any enquiries for information from the public or other third parties should always be directed to the relevant record keeper(s).

Internal Sources

Planning & Enforcement Team records – This should always be the starting point for any investigation.

Building Control records – Although building control matters are sometimes dealt with by third parties, notification to the Council of the commencement of works is still required and can provide useful information. In some cases, plans and details identifying the original built form/land use purpose of a site can be found in these records.

Council Tax/Business Rates records – These can provide the contact address of the person who is paying council tax or business rates. Details of any site visits made by an Inspector before rating might also be available. In addition, undertaking a comparison with ownership records may show periods of rental, or voids between rentals.

Local Land Charges Register – This Register will produce a record of all planning applications granted conditionally, advertisement consents, enforcement and stop notices, Tree Preservation Orders (TPO's) conservation areas and Section 106 agreements. Costs of any direct action taken should also be recorded, until such time as they have been recovered. Records identifying checks of the Register, undertaken by prospective purchasers of land, can also assist with prosecution cases (especially if a person denies knowledge of an enforcement notice).

Electoral Register – This should include occupant data over a period of time and is particularly useful when comparing names to tenancy agreements that may have been submitted as part of a case for immunity.

Housing Team records – This will include details of any visits undertaken by officers under the Housing Act 2004.

Housing Benefits records – These records can show who was purportedly in occupation of a property, if this needs to be established as part of an enforcement investigation.

Environmental Health records – These records provide information on visits to food, entertainment and drinking premises, which may assist in establishing the use of a property or reveal information about a proprietor.

Street Services records – These records include requests for bin/waste collections or street repairs from a property, which may help establish who occupied a site at a particular time.

External Sources

Land Registry – Searches can be made using a specific address or postcode. Search results will reveal details of the proprietor, any entries affecting the right of disposal, and a record of charges and encumbrances etc. adversely affecting the land. A title plan can also be obtained from the Registry to identify the extent of the ownership.

Companies House – A considerable amount of company information is available from this source including names, addresses and birth dates of directors. Records of previous company names and addresses are also kept. Accounts can disclose trading status, information on assets and details of company owners.

Google Earth / Street View – Google Earth and Street View now hold a significant library of date stamped aerial and street photographs over the past 25 years.

DVLA – Local Authorities can request information about vehicles in certain circumstances.

Environment Agency – This Agency holds information about permits and licences for various activities on a site, as well as publicly accessible LIDAR data which can be useful in determining land level changes.

County Councils – For non-unitary authorities, county councils will hold records relating to waste and mineral planning activity.

Zoopla/Rightmove – These websites sometimes keep records of property sale brochures and rental advertisements.

Neighbours – Neighbours can be a good source of information. However, they must be made fully aware if their evidence is to be used as part of an appeal or prosecution case.

The Police National Computer – Can only be used in criminal prosecution cases to ascertain if a defendant has any prior convictions for the same offence.

1.2 Requests for information (Neill Whittaker, Ivy Legal)

Before serving an enforcement notice, the LPA must take steps to ensure, as far as possible, that all available and relevant information has been obtained. There are three tools available to gather such information:

Notice served under Section 171C Town and Country Planning Act 1990

The LPA may serve a Planning Contravention Notice (PCN), instructing the recipient to provide requested information about activities on land for enforcement purposes.

The notice may be served on the owner or occupier of the land or on a person who has any interest in the land. It may also be served on any person carrying out operations on or using the land for any purpose (regardless of their interest in the land).

The notice must contain the following:

- A description of the land to which it refers, referenced by a red edged site plan;
- Details of the alleged breach;
- What is required (i.e. the questions);
- The time for compliance (i.e. 21 days);
- A warning regarding non-compliance and providing false information; and
- Additional information regarding further action and compensation in respect of a stop notice.

Sections 171C(2) & C(3) set out the type of information that can be obtained via a PCN. The LPA can also ask other questions it considers necessary. Such questions should be kept clear and straightforward, requiring simple specific responses (wherever possible) relating to the breach of planning control.

A PCN cannot be used speculatively. It must be apparent to the LPA that there has been a breach of planning control before this notice can be served. However, at this preliminary information gathering stage, there need not be definitive proof on all aspects of the alleged breach, including the "planning unit", or whether the activity is subordinate or ancillary to the principal land use purpose.

A PCN cannot be used to obtain information in relation to suspected planning control breaches of listed buildings, conservation areas, hazardous substances, or protected

trees.

Failure to comply with a PCN is an offence, as is knowingly and/or recklessly making false or misleading statements on a material particular. The penalties on summary conviction are currently £1,000 & £5,000 respectively.

Notice served under Section 330 Town and Country Planning Act 1990

A Section 330 notice can be served on the occupier of any premises and any person who, either directly or indirectly, receives rent in respect of that premises. The notice must specify the time by which the person(s) served must respond - i.e. at least 21 days after the date the notice was served.

As can be seen from Section 330(2), the range of questions which can be asked through this notice is limited. Consequently, the notice is only useful to ascertain current land use and ownership details.

Failure to comply with a notice served under Section 330 is an offence, as is knowingly making any misstatements in respect of it. The penalties on summary conviction are currently £1,000 & £5,000 respectively.

If all that is required is information regarding the ownership of land, enforcement officers may find it more useful to serve a Requisition for Information.

Requisition for Information

Section 16 of the Local Government (Miscellaneous Provisions) Act 1976 enables a LPA to obtain information for the purpose of exercising its powers under the Town and Country Planning Act 1990.

If the LPA “considers that it ought to have information connected with any land” it may serve a requisition on any of the following:

> ***(a) the occupier of the land; and***
>
> ***(b) any person who has an interest in the land either as freeholder, mortgagee or lessee, or who directly or indirectly receives rent for the land; and***
>
> ***(c) any person who, in pursuance of an agreement between himself and a person interested in the land, is authorised to manage the land or to arrange for the letting of it***

A requisition can therefore be served on a bank or building society etc.

The requisition must specify “the land and the function and enactment conferring the function”. The requisition must also specify the period by which the recipient must provide the LPA with the following information (at least 14 days commencing from the

day the notice was served):

> ***…the nature of his interest in the land and the name and address of each person whom the recipient of the notice believes is the occupier of the land and of each person whom he believes is, as respects the land, such a person as is mentioned in the provisions of paragraphs (b) and (c) of this subsection.***

Failure to comply with such a notice or the making of a statement which is false in a material particular (and which the maker either knows to be false, or makes recklessly) is a criminal offence, the penalty for which is currently £5,000 on summary conviction.

1.3 Surveillance (Adam Rulewski and Ervin Hoxha)

Any surveillance undertaken by planning enforcement officers should be overt.

The LPA's focus should therefore be to ensure that overt surveillance does not inadvertently become covert. Surveillance is covert if, and only if, it is carried out in a manner calculated to ensure that any persons who are subject to the surveillance are unaware that it is, or may be, taking place.

Although local authorities may seek judicial approval of directed covert surveillance, this is not generally an option for planning enforcement officers because approval can only be sought to prevent or detect criminal offences punishable by imprisonment.

Drones

There has been an increased interest in the use of drones, or Unmanned Aerial Vehicles (UAV) for planning enforcement. Planners must comply with the Regulation of Investigatory Powers Act 2000 in relation to conducting drone surveillance, and must also ensure that such surveillance is conducted overtly. This may be achieved by undertaking sufficient advertising and publication, and by writing to any individuals who may be affected by the surveillance measures.

Drone surveillance by local authorities for planning enforcement purposes can prove beneficial in areas where there is no access to the land in question and/or the planning breaches involve more than one property. Drones are a safe means of surveying large sites, specific areas where planning breaches may have taken place (such as development to the rear of properties), or sites which present a risk to officer safety (such as untidy land).

In addition to the above, local authorities should ensure robust Data Protection Policies are put in place and complied with. Data Protection Impact Assessments for these activities would be beneficial to ensure compliance is achieved.

The commercial use of UAVs is subject to extensive regulation from the Civil Aviation Authority. While some local authorities are registered as drone operators, the compliance requirements mean that planning enforcement officers are likely to need to engage their authority's specialist drone team or a commercial provider if drone footage is required.

Section 2: Site visits and entry

2.1 Site safety and lone working (Craig Allison & Dawn Russell)

Planning enforcement officers are expected, in the course of their duties, to visit building sites, derelict buildings and wasteland. However, officer safety is vital during site visits and employers must know exactly where they are in case of an emergency, particularly since most enforcement officers work by themselves without close or direct supervision (i.e. they are 'lone workers').

All LPAs should maintain a database of individuals who are classed as dangerous or vulnerable. This should be reviewed prior to any visit to ensure that officers are not going alone to a site which requires back up. If an officer has to visit a site that is known to be dangerous, then they should take all necessary precautions, including visiting the site with at least one other work colleague.

If any persons encountered whilst on a site visit become aggressive, it is good practice to walk away from the situation and return to the office. Officers must not, at any time, risk their personal safety unnecessarily. When returning to the office, officers must ensure that the incident is reported in order that required steps can be taken when re-visiting the site in the future.

Prior to undertaking a site visit, planning enforcement officers should complete a booking out record setting out:

- Where they are going;
- Who they are with;
- Expected time of arrival on site;
- Duration of the site visit; and
- Expected time of return to the office (or expected time to report-in via telephone if not returning to the office).

If visiting more than one site, the record should be put in order of the sites the officer is visiting; earliest to latest. If for whatever reason an officer is delayed on-site, then the officer should contact the office to keep them informed of the new expected time of return to the office.

Somebody in the office should have access to the booking out record so that contact can be made with an officer who has not returned or reported in as expected, to ascertain the reason for any delay.

An officer who uses their own car for site visits has a distinct advantage, in that all equipment and clothing required for site safety can be kept permanently to hand. There is no definitive list of equipment, as roles vary, but most enforcement officers will be expected, in the course of their duties, to visit a variety of sites. Below is a list of equipment that should be a basic requirement when undertaking site visits:

- Mobile telephone;
- Safety shoes/boots;
- Hard hat;
- High visibility jacket; and
- Waterproofs.

LPAs should provide training to all enforcement officers covering topics such as ‘conflict resolution’, ‘interpreting body language’, ‘development of good communication skills’ and ‘managing a meeting’. If an officer feels that they would benefit from training, they should raise this with their employer.

At all times when on site, officers should use their common sense, must not take unnecessary risks, and must make sure they remain safe at all times. Officers should ensure fellow colleagues are aware of their movements, and keep them informed if they are going to be late or if an incident occurs.

All of the above should be contained in a Risk Assessment kept and maintained by team leaders, informed by planning enforcement officers. It is also advisable to consider the adoption of a lone working policy to include details on equipment, training and communication channels and details.

2.2 Rights of entry (Craig Allison)

Planning enforcement officers are given extensive powers to enter land and buildings for enforcement purposes under Sections 196A to 196C (‘Rights of entry for enforcement purposes’) of the Town and Country Planning Act 1990.

Section 196A of the Act gives any person, duly authorised in writing by a LPA, the right to enter any land at any reasonable hour provided there are reasonable grounds for believing that entrance is required to “ascertain whether there is or has been any breach of planning control on the land or any other land”.

24 hours’ notice must be given to the occupier of any building used as a dwellinghouse before admission to the premises can be obtained. Caravans are not usually buildings and cannot usually be entered without consent.

In the majority of occasions, officers will not need to utilise their powers of entry under the Act. Officers should always, however, be in a position to produce a power of entry card if requested. The power of entry card should be provided by the LPA and must be duly signed by an authorised person. It must include a photograph of the officer, and detail their power of entry.

In some cases officers may find that although they have the right to enter land to investigate alleged breaches of planning control, individuals may refuse entry and obstruct access. Officers should not engage in arguments on site. Instead, officers can use their powers under Section 196B of the Act to obtain a warrant from the local Magistrates' Court.

If a warrant is obtained, this will authorise entry on one occasion only which must be undertaken at a reasonable hour within one month from the date of issue of the warrant. Only the officer who obtained the warrant can execute that warrant. A copy of the warrant should be left with the owner or occupier of the land. If they are not present, a copy of the warrant should be clearly displayed on the land.

A warrant is normally obtained if entry to the land has been refused, or if a refusal is anticipated. It is therefore advisable when executing the warrant, to contact the local police and ask them to attend to deal with any potential breach of the peace.

If any person wilfully obstructs an officer in the exercise of their rights of entry, then they are guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale, currently £1,000.

Section 3: Establishing breaches & expediency

3.1 Development defined (Neill Whittaker, Ivy Legal)

The starting point for determination as to whether something constitutes “development” (and is therefore subject to planning control) is Section 55(1) of the Town and Country Planning Act 1990, which sets out that “development” means:

> ***the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.***

Section 55(1A) states that “building operations” includes

> ***(a) demolition of buildings;***
>
> ***(b) rebuilding;***
>
> ***(c) structural alterations of or additions to buildings; and***
>
> ***(d) other operations normally undertaken by a person carrying on business as a builder.***

The Act also specifies what does not constitute development such as:

> ***(a) the carrying out for the maintenance, improvement or other alteration of any building of works which***
>
> ***(i) affect only the interior of the building, or***
>
> ***(ii) do not materially affect the external appearance of the building.***

The term ‘material change of use’ is not defined in the Act. However, two instances of what constitutes a material change of use are given, these being the use of a previously single dwellinghouse as two or more dwellinghouses and the deposit of refuse or waste material on land.

In some instances, determining what constitutes a material change of use is not straight forward but should always be judged as a matter of fact and degree taking into account the individual merits of the case. When assessing the materiality of a change of use two things should be considered:

- Any change in the character of the use itself, including the land where it is

located; and

- the effects of the change upon neighbouring uses and the locality.

Always bear in mind that for a change to be material, the new use must be substantially different from the preceding use.

Some operations or uses may be considered as ‘de minimis’, meaning that they are so minor as to have no legal consequence. Again, determining whether something is de minimis is a matter of fact and degree.

3.2 Permitted development (Howard Leithead, No5 Barristers’ Chambers)

General Permitted Development Order

Most permitted development rights are conferred by the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO).

Procedures are set out in the Town and Country Planning (Development Management Procedure) (England) Order 2015 (‘DMPO’).

The GPDO has the effect of granting planning permission for those classes of development described as permitted development within Schedule 2, subject to various exclusions set out in the Order.

The Parts in Schedule 2 to the GPDO are:

Part 1	Development within the curtilage of a dwelling-house
Part 2	Minor operations
Part 3	Changes of use
Part 4	Temporary buildings and uses
Part 5	Caravan sites and recreational campsites
Part 6	Agricultural and forestry
Part 7	Non-domestic extensions, alterations etc
Part 8	Transport related development
Part 9	Development relating to roads
Part 10	Repairs to services
Part 11	Heritage and demolition
Part 12	Development by local authorities
Part 12A	Development by local authorities and health service bodies
Part 13	Water and sewerage
Part 14	Renewable energy
Part 15	Power related development

Part 16 Communications
Part 17 Mining and mineral exploration
Part 18 Miscellaneous development
Part 19 Development by the Crown or for national security purposes.
Part 20 Construction of New Dwellinghouses

The Parts in Schedule 2 to the GPDO are sub-divided further into classes. The majority of these are subject to conditions and limitations. The conditions and limitations, together with the interpretation of each class, should be read carefully before deciding if a development has the benefit of planning permission granted under each class.

The conditions and limitations can be the subject of enforcement action in that they are attached to a grant of planning permission, albeit planning permission granted by the GPDO.

Changes of use under Part 3 are only exercisable one way. Consequently, where a change of use is noted as having taken place under Part 3, it should be recorded and then monitored to ensure it does not revert back without the required planning permission.

When determining the appropriateness of enforcement action, it is necessary to consider whether any other restrictions set out in the GPDO apply, or whether permitted developments have been withdrawn by a direction made under Article 4 of the GPDO (i.e. an Article 4 direction).

Finally, an enforcement notice will be interpreted so as not to interfere with permitted development rights. Thus, in the context of a prosecution under Section 179 of the Town and Country Planning Act 1990, a defendant may put in issue whether the activity relied on as a breach of the enforcement notice is, in fact, caught by the notice.

Other means of granting permitted development rights

When considering enforcement action, it should not be forgotten that permitted development rights may be granted by means other than by the GPDO. These include:

- Special development orders: these grant planning permission for a specified development or class of development, though the procedure is now rarely used;
- Local development orders: these are made by LPAs and grant planning permission to specific types of development within the Authority's area; and
- Neighbourhood development orders and community right to build orders: these fulfil a similar function within smaller neighbourhood areas.

3.3 Expediency (Neill Whittaker, Ivy Legal)

Section 172(1) of the Town and Country Planning Act 1990 sets out that a LPA can issue an enforcement notice where:

> ***(a) there has been a breach of planning control; and***
>
> ***(b) it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.***

In relation to Section 172(1)(b) above, expediency applies equally to decisions not to take enforcement action or to underenforce.

Forming the judgement that it would not be expedient to take action requires as much care and argument as deciding to take action. Expediency, along with determining that something is de minimis, is not a route to reduce the workload of enforcement officers or to avoid making difficult decisions.

Public opinion can bring pressure to take enforcement action. In particular, where a development has been granted consent following objections from local residents, it is to be expected that they will police the development. Care must be taken in such cases to ensure that expediency remains a planning decision and is not influenced by public opinion. In addition, care must also be taken to ensure that the issues that were raised and dealt with during the planning application (and appeals) process, are not allowed to be resurrected.

Further pressure can be brought by threats to involve the Ombudsman, a local councillor or MP. Notwithstanding the nature or the extent of complaints, expediency is still a matter for the LPA and if it decides to exercise its discretion and take no action, its reasons for doing so should be explained in detail to all complainants. The RTPI has published 'Probity and the Professional Planner' Advice Note which may assist officers in their decision making.

An adopted local enforcement plan can also assist in such circumstances, as this document can clearly set out (for example) the types of breaches on which a LPA will concentrate its resources, including that breaches which do not cause planning related harm are unlikely to be enforced against. Complainants can then be directed to this document.

Section 4: Enforcement Notices

4.1 Enforcement Notices (Neill Whittaker, Ivy Legal)

The power to issue an Enforcement Notice is given by Section 172(1) of the Town and Country Planning Act 1990, which states that the LPA **may** issue a notice if they consider it **expedient** to do so.

A breach of planning control (Section 171A(1)) may only relate to either:

> ***(a) carrying out development without the required planning permission; or***
>
> ***(b) failing to comply with any condition or limitation subject to which planning permission has been granted.***

The notice must be properly authorised by the appropriate LPA Officer or Committee. The person or Committee responsible for authorising enforcement action will be set out in the Council's constitution.

Content of an Enforcement Notice

> ***"does the notice tell [the person on whom it is served] fairly what he has done wrong and what he must do to remedy it?[1]"***

The statutory requirements for enforcement notices are listed in Section 173 of the Act. They include the following:

- The Breach – Ensure the breach is described fully and accurately so the recipient knows exactly what it is. If a mixed use is alleged, ensure all elements that make up the breach are included (remember Section 173(11)). Refer to plans or other documents to assist with identification of the breach and its location within the planning unit.
- Reasons – State what the relevant immunity period is. Set out why the unauthorised development causes harm and is contrary to planning policy. Make clear whether the notice is seeking to remedy the breach or to remedy any injury to amenity caused by the breach (s173(4)) (and make sure it is the former).
- Specify the requirements – The steps required to remedy the breach must be clearly specified. Precision is important because criminal liability is at stake. A vague or ambiguous requirement could result in the notice being rejected as invalid.

[1] Miller-Mead v Minister of Housing and Local Government [1963] 2 Q.B. 196, 232

A Material Change of Use notice may lawfully require removal of integral operational development even if immune or not development[2]. The requirements of a notice must relate to the breach. The express requirements of an enforcement notice should not be drafted in such a way as to abrogate pre-existing rights, including but not limited to existing use rights (see *Mansi* Doctrine).

- Date it takes effect – This must be more than twenty eight days following service, and the notice must specify a calendar date on which it takes effect. An appeal, if made, must be made **before** the notice takes effect. If made on the date it takes effect it will be turned away by the Planning Inspectorate. Ensure that ample time is left for the notice to arrive if serving by post.
- Time for compliance – Commences on the day the notice takes effect. Different times may be specified for different requirements. The time can be extended even after the notice takes effect in accordance with Section 173A.
- Additional Information – Every copy of an enforcement notice must also be accompanied by an explanatory note explaining:
    - that there is a right of appeal to the Secretary of State;
    - that an appeal must be received by the Secretary of State, in writing, before the date on which the Notice takes effect;
    - the grounds on which the appeal may be made;
    - Relevant fees for any appeal; and
- A list of those served with the notice.

See Article 5 of The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002.

NOTE:

The Queen oao East Sussex CC v Secretary of State for Communities and Local Government, Michael and Gary Robins [2009] EWHC 3841 (Admin*)* provides that in areas where two tier authorities remain it is for the District Council to take enforcement action unless what appears to be the alleged breach of planning control relates solely to a County matter as defined.

Service of an Enforcement Notice

[2] See: Murfitt v Secretary of State for the Environment (1980) 40 P. & C. R. 254 & Hydro v Secretary of State for Communities and Local Government [2016] EWCA Civ 784

Section 172(2) of the Act sets out that an enforcement notice must be served:

> ***(a) on the owner and on the occupier [even if they don't have the right to be there] of the land to which it relates; and***
>
> ***(b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.***

It is better to over-serve a notice than to under-serve a notice. Therefore, in addition to sending the notice to the named owners and occupiers, officers should include copies addressed to "the owner" and to "the occupier". However, officers should avoid issuing notices addressed to the "owner/occupier" together and ideally these should be kept separate.

Section 329 of the Act sets out how a notice should be served i.e. personally, by leaving it at the property and by registered post. Officers should read this section carefully. In addition to serving the notice at the Land Registry address, also ensure service at the "usual or last known abode". There are alternative service provisions in the Local Government Act 1972 in case of difficulties.

Where an address for service using electronic communications has been given, service can be to that address (recipient must however have agreed to be served via this method).

In case of service on an incorporated company, officers must address it to the Company Secretary or Clerk at their registered or principal office (details can be found at Companies House) by prepaid letter/recorded delivery.

Both the notice and envelope must state "Important — This communication affects your Property"[3]

Section 188 Register (Enforcement Register)

Every District Planning Authority (DPA) and the council of every metropolitan district or London Borough must keep an Enforcement Register. Details of all enforcement notices, stop notices, enforcement orders and breach of condition notices issued in respect of land in their area must be entered in the register. Every entry must be made within fourteen days of the occurrence to which it relates. The details required to be entered are stipulated by the DMPO (Article 43).

If a County Planning Authority (CPA) issues an enforcement notice, a stop notice or a

[3] Town and Country Planning General Regulations 1992 (part 13)

breach of condition notice, it must supply the relevant information listed above to the DPA to enable that Authority's register to be brought up to date. This information must also be entered into the register within fourteen days of the occurrence. So, although the CPA has fourteen days in which to supply the information, it must do so in time to allow the DPA to enter it into the register within the stipulated fourteen days.

The register must be available for inspection by the public at all reasonable hours and indexed to allow a person to trace any entry by reference to the address of the land to which the notice relates. It is important to ensure the register is updated as soon as possible and is kept up to date if a notice is withdrawn or quashed or, in the case of an Enforcement Order, is rescinded or expires.

Section 215 Notices and PCN's are not required to be entered into the Section 188 register.

Section 5: Appeals

5.1 Who can appeal (Roderick Morton, Ivy Legal)

Section 174 Town and Country Planning Act 1990 lists those who may appeal. They are:

- A person who has an interest in the land; or
- a relevant occupier.

Those with an "interest in the land" would include freehold owners, leasehold owners and tenants. It could conceivably include other interests such as a mortgage company or the owner of agrarian or mining rights.

A "relevant occupier" is defined at Section 174(6) as a person who occupies the land under licence at the time the notice is issued and continues to do so at the time of the appeal.

Questions of standing to appeal tend to arise where a trespasser seeks to appeal, claiming a licence to occupy. A licence can be expressed or implied. It can be written or verbal. It can be tacit if, for instance, the landowner fails to take action to remove an occupier. However, if the landowner actively denies consent, it is unlikely that a licence will be implied.

It can be seen then that while all occupiers have to be served with a notice, not all occupiers can appeal. Similarly, the fact that an occupier has been served does not itself grant the right to appeal.

If a council feels that an appellant has no standing to appeal, the correct procedure is to raise that with the Inspectorate on receipt of the appeal. Once an appeal is validated, it is less likely that a challenge will be accepted.

5.2 Grounds of appeal (Roderick Morton, Ivy Legal)

An appeal may be made to a Planning Inspector on one of the grounds set out in Section 174 Town and Country Planning Act 1990. These are:

Ground (a)

> ***That, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned***

ought to be discharged

In effect then, this is a planning application for the matters stated in the notice, or part of them. There is no power to grant permission for a different scheme. A fee (double the normal planning application fee) must be paid in order to run this ground of appeal. The permission will be considered on the basis of the policies before the inspector.

There are limitations on the power to make a ground (a) appeal. While these will generally be dealt with by the PINS case officer, it is worth knowing about them. You can find more information about them, including transitional arrangements, in DLUHC's Planning Practice Guidance on enforcement and post-permission matters.

Ground (b)

That [the matters stated in the notice] have not occurred

This is the ground under which matters of fact relating to the allegation (including its description of the breach) will be challenged. Examples might be that an alleged dwelling is in fact a store room, or that stationing of a residential caravan was in fact construction of a building, or that the alleged change of use did not take place or was misdescribed.

Ground (c)

That [the matters stated in the notice] (if they occurred) do not constitute a breach of planning control

This ground might include claims that the matters alleged do not constitute development, or that they are within the appellant's permitted development rights. It is common for ground (c) appeals to involve hidden ground (b) appeals.

Ground (d)

That, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by [the matters stated in the notice]

It is too late if enforcement action may not be brought due to the time limits in Section 171B.

Ground (e)

That copies of the enforcement notice were not served as required by Section 172

There is power under Section 176(5) to discount failed service if neither the appellant nor the person not served have been substantially prejudiced. Where there is prejudice, the notice must be quashed.

Ground (f)

> ***That the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach***

This ground links back to the purpose of the notice in Section 172. Where the purpose of the notice is to remedy a breach of planning control, steps should be sufficient to achieve that purpose (unless underenforcement is intended) and should not exceed that purpose. The ground (f) appeal is limited where no ground (a) appeal is made as planning merits are not usually open for consideration. Fall backs and obvious alternatives can be considered if raised. Ground (f) arguments must be clear on what lesser steps are being proposed.

Ground (g)

> ***That any period specified in the notice in accordance with Section 173(9) falls short of what should reasonably be allowed***

There is no tariff of reasonable periods but factors might include the need to evict occupiers or the need to specify and tender work. The need to raise finance is not usually accepted as a factor.

Hidden grounds

LPAs should be alive to the possibility that an argument advanced under one ground is in fact an argument under a different ground and should deal with it as such.

5.3 Planning Inspectorate procedure (Roderick Morton, Ivy Legal)

Time to appeal

An appeal against an enforcement notice must be brought before the notice becomes effective. This means it must be filed by the end of the day before the effective date specified on the notice. There is no power to extend this deadline.

Validation

On receipt, the Planning Inspectorate will examine the appeal to ensure that the appellant has standing to appeal, that the appeal complies with formalities, and that it discloses a case. The Planning Inspectorate may ask an appellant to provide further details. Once satisfied, the Inspectorate will notify the LPA that the appeal is valid. If a deemed application is made under ground (a), the appellant will be invited to pay the

relevant fee by a particular date. If the fee is not paid by that date, there is no power to extend and the ground (a) appeal lapses.

Available procedures

Three appeal procedures available. These are:

- Written representations;
- Public Inquiry; and
- Hearing.

The Planning Inspectorate determines the appeal procedure after inviting the views of the parties. Some appeals will be dealt with by two procedures.

Start letter and initial work

After determining the procedure, the Planning Inspectorate will allocate the case to an inspector when one is available. In due course, a start letter is issued setting out the timetable for the appeal.

The LPA completes the appeal questionnaire, which asks questions as to the appeal site and the policies at issue in the appeal.

Written representations

The parties each have the opportunity to submit an appeal statement. The deadline is specified in the start letter; while there is discretion to extend, any such request should be made before the deadline.

Statements and evidence are submitted in writing. Statements are cross-copied to the other party by the Planning Inspectorate. Statements are not made under oath.

The parties then each have the opportunity to make final comments on the other's statement. In theory, no new evidence will be accepted at this stage but inspectors have discretion to accept evidence.

Public Inquiry

Where it is important to take evidence under oath (e.g. ground (d) appeals), or for certain other matters of particular importance, the Planning Inspectorate may select a Public Inquiry.

The parties must then prepare and file a statement of case and the parties have an opportunity to comment on each other's statement. In practice, enforcement inquiry statements tend to be formulaic with little genuine information.

At least four weeks before the inquiry, each party must file a proof of evidence setting

out the evidence it intends to rely on at the inquiry. Inspectors have discretion to admit evidence at a later date, including the date of the inquiry, but late filing can result in a costs award.

Parties should seek to agree a statement of common ground where possible.

At the inquiry, where appropriate, evidence will be taken under oath.

Parties will be invited to make opening statements, to present their evidence, to cross-examine the other side and to make closing statements. Generally, the LPA will open first and the appellant will close last.

There is no obligation to hire lawyers to present the case at a public inquiry but many LPAs will do so.

Hearing

Where a round table discussion would be helpful to resolve some of the issues, the Planning Inspectorate may select a hearing. The parties must file a full hearing statement and have the opportunity to comment on each other's statement. A statement of common ground should be agreed if possible. Depending on the evidence, witness proofs may be required.

The hearing is less formal than a Public Inquiry; evidence is not usually taken on oath, the procedure is inspector-led rather than advocate-led and there is more of an opportunity for discussion.

Burden of proof, standard of proof, rules of evidence

The burden of proof is on the appellant to demonstrate their case in grounds (b) to (g). The standard of proof is the balance of probabilities. Appellants must present precise and unambiguous evidence.

Appellants are entitled to be believed if they make a precise and unambiguous statement. However, if the LPA presents evidence which renders the appellant's version of events less than probable or directly contradicts it, appellants will be required to present corroborating evidence (e.g. documents, witness statements).

There are no specific rules of evidence (e.g. no ban on hearsay) but inspectors will consider the source and reliability of the evidence in deciding what weight to attribute to it.

Decision process

After considering the evidence and arguments, the inspector will issue a written decision letter setting out the decision and the reasons for the decision.

The inspector may dismiss the appeal or allow parts of the appeal, either amending or

quashing the notice.

Power to dismiss appeal for undue delay

The Levelling Up and Regeneration Act 2023 ("LURA") introduced a new power for a planning inspector to dismiss an appeal if the appellant is responsible for undue delay to the appeal process. It is not clear when and if this power will be used.

5.4 Immunity (Roderick Morton, Ivy Legal)

Section 171B sets out the time limits for taking enforcement action. Following 25 April 2024, s171B is amended by LURA so that the time limit for taking any form of enforcement action is 10 years. This includes action against operational development, material changes of use and breaches of condition.

However, transitional provisions apply. These are:

- For breaches involving the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, where substantial completion is before 25 April 2024, the time limit is **four years from substantial completion**; and
- For breaches involving the change of use of any building to use as a single dwellinghouse where the change of use took place before 25 April 2024, the time limit is **four years from the date of the breach.**

These limits are construed strictly against the appellant. Considerable care must be exercised by appellants seeking to rely on them. Points for LPAs to consider include:

- Substantial completion is not always clear and is a matter of fact and degree. A building is complete when it is complete for the purposes for which it was intended. Where a building has been built in stages, each stage may open a new chapter in its planning history; if lawfulness of a previous stage has not been accrued and demonstrated, this will restart the clock. Substantial completion arguments are likely to increase for the next few years following LURA as appellants seek to benefit from the transitional provisions.
- A material change of use normally takes place at the time the new use begins. But there are circumstances where it may be earlier. Again, we can expect an increase in arguments on the timing of use over the next few years, particularly where there are intervening unlawful uses.
- Construction of a building as a dwellinghouse is not a change of use; the time limit in such cases is 10 years. Conversion to something other than a single

dwellinghouse (e.g. a mixed use) is not within Section 171B(2). However, conversion to a number of dwellinghouses (eg flats) may be within Section 171B(2) as a "building" includes parts of a building.

Where there is deception, the time limits can be extended. To show deception, LPAs must demonstrate:

- That there is positive deception;
- That the appellant intended to deceive (not, for instance, an inadvertent mistake);
- That the appellant did deceive (e.g. the LPA did not enforce); and
- That the appellant benefited from the deception (e.g. from additional rent, income or capital value).

Planning enforcement order

LPAs who believe that there has been concealment may also apply to the Magistrates court for a planning enforcement order. The order must be sought within 6 months of the date on which the LPA has sufficient information to justify the application. If granted, the LPA has 1 year (from shortly after the date of the order) to issue the notice. If granted, the order allows the notice to be issued even if otherwise out of time under Section 171B. To date, the power has been little used.

Second bite

Where a LPA issues an enforcement notice or breach of condition notice which is quashed, the LPA may serve another notice within 4 years of the date of the first notice. In addition, an enforcement warning notice will trigger the second bite provisions and extend time to enforce by 4 years.

5.5 Invalidity, nullity and power to amend (Roderick Morton, Ivy Legal)

Notices must satisfy the requirements set out in Sections 171B, 172 and 173 of the Town and Country Planning Act 1990. Failure to do so may render the notice invalid unless the notice is amended or the requirement can otherwise be waived.

Invalidity on one of appeal grounds (b) to (g) in Section 174 is determined by a planning inspector under the appeal process set out in Sections 174 - 177. If the notice is invalid for one of these reasons, the inspector has power to amend the notice. The enforcement appeal is the only place where these challenges can be raised.

Notices can also be challenged on other grounds (e.g. wrong decision on expediency)

by way of judicial review at the High Court. While rare, this may result in a finding of invalidity. There is no statutory power to amend the notice in these cases.

Sometimes a notice may be so flawed that it does not function as a notice at all. In this case, the notice is a nullity. The determination of nullity is the jurisdiction of the High Court under judicial review. There is no power to amend a notice which is a nullity.

A notice which is quashed for invalidity is nevertheless a notice for the purposes of the definition of “enforcement action” under Section 171B(4). Consequently, the second bite provisions apply. In theory, a notice which is a nullity is deemed never to have existed so does not constitute “enforcement action”, does not stop the immunity clock and the LPA may find itself out of time to re-issue a notice. The courts have, however, taken a relaxed approach to this in the context of second bite notices.

Where a potentially invalid notice is not challenged in time under the appeal (or judicial review) process, it can still be the basis for a successful prosecution and, with the exception of service challenges, the challenge cannot be raised in defence to the prosecution due to Section 285. By contrast, a notice which is a nullity cannot be the basis for a successful prosecution.

Arguments over nullity and invalidity tend therefore to arise in the context of second bite appeals and prosecutions.

Examples of invalid notices are:

- Wrong allegation;
- Notice issued when development is immune;
- Notice requires excessive steps; and
- Notice improperly served.

Examples of notices which are nullities are:

- Wrong address;
- No (or inadequate) reasons;
- Allegation or steps of the notice are too vague to understand what is wrong or what must be done; and
- Uncertain compliance period.

Where a notice is invalid (though not where it is a nullity), an inspector has power to amend the notice. The inspector must be satisfied that no injustice would be caused in doing so. Factors which the inspector will consider include whether the policies applicable to the notice are the same and whether the appellant has had an opportunity

to make a case against the amended notice.

5.6 Costs (Roderick Morton, Ivy Legal)

Power to award costs

Parties to an enforcement appeal will normally meet their own costs. Inspectors have power to award costs under Section 250 of the Local Government Act 1972 as applied by Section 175(7) of the Town and Country Planning Act 1990.

Guidance on the application of this power is set out in the Planning Practice Guidance on Appeals at paragraphs 27 to 56.

In brief, costs can be awarded if one party has acted unreasonably and their behaviour has caused the other party to incur wasted costs.

Examples are set out in paragraphs 46 to 56. Important ones are:

By the appellant

- Bringing or maintaining an appeal which has no hope of success; and
- Failing to provide sufficient evidence reflecting the burden of proof.

By the LPA

- Withdrawing a notice other than for sound reasons;
- Avoidable delay in notifying the appellant;
- Failure to carry out adequate pre-notice investigations; and
- Procedural breaches.

Where an appeal proceeds to determination, any costs award will be determined by the inspector who hears the appeal. Where an appeal or a notice is withdrawn, costs will be determined by a specialist costs inspector.

Making the application

In written representation appeals, costs applications are made in writing and must be made before or with final comments. For hearings or inquiries, costs applications are made verbally and must be made before the end of the hearing; it is also good practice to notify an intention to seek costs before the inquiry begins. For costs in relation to withdrawn appeals or notices, costs applications must be made within 4 weeks of the date of withdrawal. Inspectors have discretion to accept late applications. They can also award costs without an application.

Form of application

Written applications may be submitted on this claim form, but there is no requirement to do so and applications are often made in appeal statements or simply by letter. But applications must demonstrate and evidence:

- Unreasonable behaviour by the other party; and
- Wasted cost.

Unreasonable behaviour can be substantive (e.g. where an appellant has no case) or procedural (e.g. where a party fails to turn up and a hearing is adjourned or where submission deadlines are missed). In practice, many procedural breaches do not result in wasted cost and inspectors will often either refuse to award costs where there is no substantive breach or will make only a partial award.

Commenting on applications

The party against whom the application is made will be given a chance to comment and the applicant will then have an opportunity to provide final comments.

Award

Despite the need to show wasted cost, the inspector will rule only on the principle of the cost award, not the amount. The award will invite the relevant party to agree the costs award with the other party. If costs cannot be agreed, the parties have the option to ask the High Court's Senior Courts Costs Office (SCCO) to make a determination.

The award of costs may be full (all of the costs of the appeal) or partial (e.g. costs relating to a specific ground or inquiry day). Costs cannot be claimed relating to periods before the appeal (e.g. investigations).

Costs which can be claimed include:

- Legal costs (external or internal);
- Officer costs;
- Expert witness fees;
- Administrative costs, room booking fees, other directly incurred costs; and
- VAT can be claimed by appellants but is not usually charged by LPAs.

If an application is made to the SCCO, costs will be limited by reference to the tariffs set by that court which, for example, limits hourly rates for solicitors and "inhouse" officer costs.

Failure to pay

A costs award which is unpaid is treated as a civil debt. There is no power to charge the property without a further court order.

5.7 High Court Challenges (Amanda Bancroft, Barrister, BCP Council and Izindi Visagie, Ivy Legal)

When a person or company challenges actions of the LPA by way of an action brought in the High Court, the role of the enforcement officer is likely to be limited to:

- Providing a witness statement to put the planning history and all relevant documentation into evidence before the court (noting that it would be unlikely that any additional or fresh evidence would be required); and
- Providing instructions to the legal representatives.

It is, however, important that enforcement officers understand what challenges may be brought and on what basis, if only to try to avoid the underlying actions becoming subject to challenge.

Challenges can be brought either by:

- Judicial review; or
- Proceedings under Section 288 and/or Section 289 of the Town and Country Planning Act 1990.

Judicial Review

Judicial review concerns whether or not decisions are taken lawfully and fairly. The purpose of the 'review' is to have the original decision examined in terms of whether the decision-making process (and the decision that followed) was lawful. An application for judicial review in planning matters has to be made within six weeks of the action or decision sought to be reviewed, which is an abrogated period pertaining to challenges to planning decisions. There are three broad grounds for judicial review: **illegality**, **irrationality** and **procedural impropriety**.

The most common examples of **illegality** are:

- Unlawful sub-delegation – that is, that the person who made the decision was not, as a matter of law, entitled to do so;
- an error of law or error of fact;
- where the decision-maker acted beyond their powers (known as acting *ultra vires*);
- where the decision-maker ignored relevant considerations or took irrelevant

considerations into account; and

- where the decision-maker improperly fettered their discretion – that is, where the LPA has a discretion, it cannot bind itself as to how it will be exercised

Irrationality gives us the concept of 'Wednesbury Unreasonableness'; that is, to ask "was the decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it?".

Procedural impropriety relates to the LPA's obligations to properly observe and comply with its procedural duties in a fair manner. Examples of procedural impropriety include failing to consult, or failing to give proper reasons for its decision, or showing bias.

Town and Country Planning Act 1990

Appeals against enforcement decisions issued by the Planning Inspectorate must be appealed under Section 289 of the Town and Country Planning Act 1990.

Leave to appeal is required and the claim must be filed in the Planning Court within twenty-eight days from the date of receipt of the appeal decision. Challenge to an enforcement notice appeal decision under Section 289 is an appeal and proceeds by way of part 52 of the Civil Procedure Rules.

The Section 289 appeal application must be made in writing and set out the reasons why permission (for leave to appeal) should be granted and, if the time limit has expired, the reasons for any delay. The court's practice directions further set out detailed requirements for what must be included with the application.

All documents in support of the application, including a witness statement verifying any facts relied on, must be served on the following:

- Respondents (i.e. Government Legal Department for service on the Secretary of State and the appellants to the original notice); and
- all persons having an interest in the land and everyone who was originally served with a copy of the notice before the application is lodged with the Administrative Office of the Planning Court.

Crucially this needs to take place within 28 days of receipt of the appeal decision although the Court may extend the time.

If a LPA wants to challenge the grant of planning permission on an enforcement appeal (i.e. ground (a) appeal succeeding), this can be done under Section 288 (following Section 284(3)(e) of the Town and Country Planning Act 1990).

The court may refuse leave to proceed where it finds that there is no arguable case and also where it is plain, having regard to the decision as a whole, that no substantial wrong or miscarriage of justice has been occasioned by any misdirection in relation to the law.

If permission is granted, the matter proceeds to a hearing by a single judge after notice is given to all relevant parties.

If the Section 289 appeal is successful, the matter is remitted back to the Secretary of State. There is no power to quash a decision or set aside an enforcement notice.

Upon the matter being remitted back to the Secretary of State (the Planning Inspectorate), the matter can be considered afresh, but there is no obligation to do so.

The court's Best Practice guidance on appeals under Section 289 can be found here.

Section 6: Other enforcement powers

6.1 Planning Enforcement Orders (Craig Allison)

Planning Enforcement Orders were brought in by Government via the Localism Act 2011, which introduced Section 124 and subsequently added Sections 171BA, 171BB and Section 171BC into the Town and Country Planning Act 1990.

The effect of this legislation is to enable LPAs to apply to the local Magistrates' Court for an order against a person who deliberately conceals unauthorised development. The order, if granted, enables the LPA to take action in relation to an apparent breach of planning control, notwithstanding that the time limits may have expired.

The LPA must have sufficient evidence of the apparent breach of planning control to justify application for a planning enforcement order. The Magistrates' Court may make a planning enforcement order only if it is satisfied on the balance of probabilities that the actions or persons have resulted in, or contributed to, full or partial concealment of the apparent breach or any of the matters constituting the apparent breach. The Court must also consider it just to make the order.

The application may be made within 6 months of the date on which sufficient evidence of the apparent breach came to the LPA's knowledge. The appropriate officer must sign a certificate on behalf of the LPA which states the date on which that evidence came to the Authority's knowledge. The certificate will then be conclusive evidence of that fact.

The application must be made to a Magistrates' court and a copy must be served on the owner and occupier of the land, and on anyone else with an interest in the land which, in the LPA's opinion, would be materially affected by the taking of enforcement action in respect of the breach. The LPA, any person who has been served with the application, and any other person the court thinks has an interest in the land that would be materially affected by the enforcement action, have a right to appear before and be heard by the court hearing the application.

The effect of a planning enforcement order is that the LPA will be able to take enforcement action (i.e. issue an enforcement notice or breach of condition notice) against the apparent breach of planning control, or any of the matters constituting the apparent breach, during the "enforcement year".

The "enforcement year" begins at the end of the 22nd day starting with the day on which the court's decision to make the order is given, or when any appeal against the order

has been finally dismissed, or the appeal withdrawn. It lasts one calendar year from that date.

The LPA may make an application even if the normal time limit for enforcement action has not expired. This is to allow for the possibility that evidence may come to light very close to the end of the normal time limits for taking enforcement action – when there may be insufficient time to draft and issue an enforcement notice, or where there may be doubt as to when the time limits actually expire.

6.2 Breach of Condition Notice (Craig Allison)

A breach of condition notice is served under Section 187A of the Town and Country Planning Act 1990 when planning permission has been granted, the permission has been implemented and the recipient is in breach of one or more of the conditions imposed by the LPA within the decision notice. The breach of condition notice is served to ensure ongoing compliance with the planning permission.

Difference between Breach of Condition Notice and Enforcement Notice

A breach of condition notice is mainly intended as an alternative to an enforcement notice for remedying a breach of condition. However, it may also be served in addition to an enforcement notice, perhaps as an alternative to a stop notice, where the LPA considers it expedient to stop the breach quickly and before any appeal against the enforcement notice is determined.

The principal difference between the two types of notice is that a breach of condition notice takes effect immediately as there is no right of appeal to the Secretary of State, the reason being that the owner can appeal any of the planning conditions following its approval. This therefore allows for a quicker approach than an Enforcement Notice.

A breach of condition notice is a fairly blunt tool in that it can only enforce the requirements of the condition imposed. It is not possible to underenforce on a breach of condition notice. Therefore, it may be more appropriate to serve an Enforcement Notice as it has wider scope to take the appropriate action as necessary.

Time to comply

Those served with a breach of condition notice must be given at least 28 days to comply.

Appeals

There is no right of appeal to the Secretary of State against a breach of condition notice. The validity of a breach of condition notice, and the propriety of the LPA's decision to

serve the notice, may be challenged by application to the High Court for judicial review.

Effect of non-compliance

Following the end of the period for compliance, a “person responsible” who has not ensured full compliance with the conditions and any specified steps, will be in breach of the notice and guilty of an offence under Section 187A(8) and (9) of the Town and Country Planning Act 1990. This can lead to an unlimited fine on summary conviction. Prosecution takes place exclusively in the Magistrates’ court.

Defences to prosecution for a breach of condition notice are that the person charged took all reasonable measures to comply or that the person did not have control of the land. Prosecution proceedings can therefore often become quasi appeals against the requirements of the notice.

6.3 Stop Notice (Craig Allison)

A stop notice prohibits any or all of the activities which comprise the alleged breach of planning control specified in a related enforcement notice, ahead of the deadline for compliance in that enforcement notice (described under Section 183 of the Town and Country Planning Act 1990).

Relationship to Enforcement Notice

A stop notice can be served only following or accompanying an enforcement notice. It can be served at the same time as the enforcement notice, but not before. A stop notice cannot be served once the enforcement notice has taken effect.

The notice must detail the activities it prohibits. The notice must refer to the enforcement notice to which it relates, and it must have a copy of that notice annexed to it.

The LPA must specify in the stop notice when it is to take effect. The effective date must normally be no less than 3 days (or more than 28 days) after the date when the notice is served. When there are special reasons for specifying an earlier date a stop notice may take effect before 3 days, in which case a statement of reasons must be served with it.

Limitations

There are restrictions on what a stop notice can prohibit, which are as follows:

- A stop notice may not prohibit the use of any building as a dwellinghouse, although it may be used to prohibit the use of land as a site for a caravan occupied by a

person as their own main residence; and

- a stop notice may not prohibit the carrying out of any activity if the activity has been carried out (whether continuously or not) for a period of more than four years ending with the service of the notice.

Compensation

When a stop notice is served under Section 183 of the Town and Country Planning Act 1990, compensation may be payable if the following occurs:

- The enforcement notice served with the stop notice is quashed other than by an appeal under a ground (a) (i.e. where planning permission should be granted);
- The enforcement notice is varied so that any activity which is prohibited by the stop notice ceases to be a relevant activity;
- The enforcement notice is withdrawn by the LPA; or
- The stop notice is withdrawn.

However, no compensation is payable in respect of an activity which is in breach of planning control (whether or not enforced against) – see Section 183(5). In many cases, the compensation risk is relatively low. Nevertheless, to prevent any unnecessary compensation claims against the LPA, a cost benefit analysis should be drawn up to assess the consequences of serving a full stop notice. This should be made available to the committee or officer who will authorise the service of the notice.

Expediency

Before serving a stop notice, the LPA should ensure that it considers it expedient that any relevant activity should cease before the expiry period for compliance, as set out in an enforcement notice.

Appeal

There is no right of appeal to the Secretary of State against the prohibitions in a stop notice. The validity of a stop notice, and the propriety of the LPA's decision to issue a notice, may be challenged by application to the High Court for judicial review.

Criminal Liability

A person who contravenes a stop notice after a site notice has been displayed, or the stop notice has been served on them, is guilty of an offence under Section 187(1) of the Town and Country Planning Act 1990.

A person guilty of this offence is liable on conviction to an unlimited fine. In determining the amount of the fine imposed, the Court must have regard to any financial benefit

which has accrued, or appears likely to accrue, as a consequence of the offence. Prosecution can be in the Magistrates' court or Crown Court.

Defences to non-compliance with a stop notice are limited to lack of knowledge of the notice.

6.4 Temporary Stop Notice (Craig Allison)

Temporary stop notices are different to normal stop notice powers, as they can be served without an enforcement notice first having been issued. In addition, the effect of a temporary stop notice is immediate; it is not necessary to wait three days before the notice takes effect or give reasons why the notice will take effect immediately.

Temporary stop notices are a powerful enforcement tool that allow LPAs to act very quickly to address some breaches of planning control, where it is expedient to do so.

The maximum length of time that a temporary stop notice will have effect is for a period of 56 days. During this period the LPA must decide whether or not it is appropriate to take enforcement action. At the end of the 56 days, there is the risk of the activity resuming if an enforcement notice is not issued and (possibly) a stop notice served.

Limitations

There are some limitations to serving a temporary stop notice, with the primary legislation making it clear that a temporary stop notice may not prohibit the use of a building as a dwellinghouse.

A temporary stop notice can require an activity to cease, or reduce/minimise the level of activity. Because a temporary stop notice is prohibitive, it is not appropriate in any circumstances which require positive action to be taken. The immediate cessation of activities should allow for the shutting down and making safe of an activity.

A further limitation is that after the 56 day period, a further temporary stop notice cannot be issued unless the LPA has first taken some other enforcement action against the breach of planning control.

Appeal

Any person affected by a temporary stop notice will be able to make representations to the LPA to challenge the notice. The temporary stop notice should include the name, address and telephone number of the nominated officer.

There is no right of appeal against this notice to the Secretary of State. However, the validity of a temporary stop notice and the propriety of the LPA's decision to issue a temporary stop notice, may be challenged by application to the High Court for judicial

review.

Criminal Liability

It is an immediate offence for anyone to contravene the notice. Therefore anyone failing to comply with the notice holds the risk of immediate prosecution in either the Magistrates' Court or the Crown Court and an unlimited fine.

6.5 Enforcement Warning Notices (Roderick Morton, Ivy Legal)

Where a planning breach is not sufficiently egregious to require an immediate enforcement notice but requires regularisation by way of a conditioned planning permission, enforcement officers might typically write to developers informally inviting an application, with enforcement notice or breach of condition notice only being issued in the absence of an application (or its subsequent refusal).

Following LURA, officers now have power to issue an enforcement warning notice (EWN), which operates as a slightly more formal version of this approach.

The EWN can only be issued within the periods set out in s171B, so 10 years from the date of the breach for all breaches but subject to the transitional provisions.

EWNs do not stop the immunity clock. If a developer fails to comply with the EWN such that further enforcement action is required, the time limits in s171B will still apply to that subsequent enforcement action.

However, the issue of an EWN operates as "enforcement action" meaning that a subsequent notice can be issued under the second bite provisions in s171B(4) TCPA 1990, so extending the time to take subsequent enforcement action by 4 years.

There must be a breach of planning control. The notice will be of no effect if, later, it is found that there is no breach. The breach must be clearly specified in the notice with the same degree of clarity as an enforcement notice; Miller-Mead would apply.

There must be a reasonable prospect that permission would be granted if it is sought. The permission can be a conditional one.

The EWN is immediately effective. There is no right of appeal.

Like an enforcement notice, the EWN must be served on the owner and occupier of the land. It must also be served on anyone else who has an interest in the land. There is no power to issue to anyone else (e.g. person merely working on the land).

There is no power to compel submission of a planning application. It is merely a warning that, in the absence of an application, further enforcement action will be considered. No

offence is committed if no application is made.

The EWN runs with the land in the sense that its effect on immunity applies against future landowners or occupiers. However, as there is no requirement for compliance, there is nothing to bind a future landowner or occupier to make a planning application.

Service is effected by the methods set out in s329 TCPA. The EWN must be entered into the s188 register.

Issue of an EWN needs to be suitably authorised. Delegations need to be checked, a report prepared, human rights and the equality duty etc considered.

EWNs are relatively inflexible compared to an informal invitation to apply for permission. It seems likely that use of EWNs may be limited to situations where the breach is close to immunity and another 4 years would be advantageous.

6.6 Listed Building Enforcement Notices (Scott Stemp, No5 Barristers' Chambers)

Planning (Listed Building and Conservation Areas) Act 1990

The system of Listed Building Enforcement Notices (LBEN's) is similar to that for enforcement notices under the Town and Country Planning Act 1990, although there are some material differences, arising from the focus on heritage considerations.

A further distinction is that immediate criminal liability can arise for certain works to listed buildings (in addition to criminal liability for failure to comply with the requirements of a LBEN). Because of the immediate criminal liability attaching to certain works to listed buildings, there is no equivalent regime within the Planning (Listed Buildings and Conservation Areas) Act 1990 (the LBA) to the stop notice/temporary stop notice regime.

Issuing the Listed Building Enforcement Notice

LPAs may issue a LBEN where:

- It appears to them that unauthorised works have been (or are being) executed to a listed building; *and*
- That those unauthorised works are:
    - for the demolition of a listed building;
    - for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest; or

- in relation to a listed building under a listed building consent which fail to comply with any condition attached to that consent.

In addition, it must be expedient to issue the LBEN having regard to the effect of the works on the character of the building as one of special architectural or historic interest. This involves balancing the advantages and disadvantages of issuing an LBEN, having regard to the provisions of the development plan and any other material planning consideration.

There is no limitation period on the issuing of a LBEN. A current owner may therefore be susceptible to enforcement action by way of a LBEN in respect of historic unauthorised works undertaken by a previous owner or occupier. Liability for breach of an extant LBEN rests with the owner at the relevant time of the breach.

Contents of a Listed Building Enforcement Notice

A LBEN must specify the alleged contravention and require such steps as may be specified within the LBEN to be taken:

- For restoring the building to its former state; or
- If the LPA considers that such restoration would not be reasonably practicable or would be undesirable, for executing such further works specified in the notice as they consider necessary to alleviate the effect of the works which were carried out without listed building consent; or
- For bringing the building to the state in which it would have been if the terms and conditions of any listed building consent which has been granted for the works had been complied with.

A LBEN must also state the date on which the LBEN takes effect, and also the date by which compliance with the steps of the LBEN must be achieved. Different periods for different steps may be specified.

As with enforcement notices under the Town and Country Planning Act 1990, a LBEN which is defective on its face (for want of a mandatory requirement) is a nullity and is of no legal effect. A LBEN will also be a nullity if it requires steps to be taken which would themselves constitute unlawful acts (for example because undertaking them would give rise to criminal liability). A LBEN which is a nullity cannot be appealed and cannot give rise to a prosecution for breach (since the LBEN is of no legal effect).

Very few LBENs will actually be a nullity however. In practice most LBENs with mistakes or flaws are more likely to be invalid. An invalid LBEN can be corrected by an Inspector on appeal (provided that correcting the defect, error or misdescription does not cause injustice). An invalid LBEN however may cause problems in due course if used as the basis for a criminal prosecution.

Description of the Contravention

The LBEN must specify the alleged contravention and must set out the substance of the LPA's complaint(s). The alleged contravention(s) should be described as fully as possible, and the LBEN must seek through its steps to enforce solely by reference to the contravention(s) as described.

The description of the breach bears significance for the grounds of any appeal, since the LBEN may only enforce against the breach(es) described, and therefore only require steps in relation to the breach(es) described. An appellant may also only seek a grant of listed building consent through an LBEN for the matters described as the alleged contravention(s) on the face of the LBEN.

Steps or Requirements of the Notice

The steps or requirements of a LBEN require careful and specific drafting, since they will potentially form the basis for criminal liability. Lack of specificity in the steps required by a LBEN will put any future prosecution in jeopardy, since a criminal court must be satisfied that a defendant was able to discern what was required of them with sufficient certainty that failure to take the step(s) can be visited with criminal sanction.

A LBEN can properly require the reconstruction of a demolished building.

Formal Validity

A LBEN is largely insulated from challenge by operation of Section 64 of the LBA, but it is not completely immune. Section 64 operates to prevent challenge to the validity of a LBEN in any later proceedings on any of the grounds on which an appeal could have been made.

It is clear therefore that a LBEN may still be challenged on any basis which would *not* form the basis of an appeal. For example, lack of clarity in the steps of a LBEN remains a basis on which a LBEN may later be challenged, since no ground of appeal exists against a LBEN in relation to 'unclear requirements'. Likewise that the requirements of the LBEN are 'not physically possible' – again no such ground of appeal exists, therefore a LBEN may be challenged in later proceedings on this basis. More commonly, challenges to LBENs arise because formalities to the issue of the LBEN were not observed (for example because it was not issued in accordance with the authority's constitution, or schemes of delegation).

Service

Failure to properly serve copies of the LBEN may give rise to a ground of appeal against the LBEN, and further may cause complications at the stage of prosecuting breaches of an LBEN or seeking an injunction to enforce the terms of any LBEN.

Service of notices is governed by Section 329(1) of the principal Act (by operation of Section 89(1) LBA).

Appeal Against a Listed Building Enforcement Notice

Any person 'having an interest in the building' or being a 'relevant occupier' may make an appeal against a LBEN. Note that the categories of persons who may appeal a LBEN is narrower than the categories of person who must be served with a LBEN.

To have an 'interest in the building' connotes either a legal or beneficial interest in the building; a 'relevant occupier' is a person who occupied the building on the date the LBEN was issued by virtue of a licence and continues to occupy the building when the appeal is brought (Section 39(7) LBA). It does not extend to trespassers, nor to those only with control over the building but holding no interest in the building. It also does not extend to those who occupy the building by licence *after* service of the LBEN.

Grounds of Appeal

The grounds of appeal pursuant to Section 39 of the LBA broadly reflect those in relation to enforcement notices under the Town and Country Planning Act 1990:

(a) That the building is not of special architectural or historic interest

(b) That the matters alleged to constitute a contravention of Section 9(1) or (2) have not occurred

(c) That those matters (if they occurred) do not constitute such a contravention

(d) That works to the building were urgently necessary in the interests of safety or health or for the preservation of the building, that it was not practicable to secure safety or health or, as the case may be, the preservation of the building by works of repair or works for affording temporary support or shelter, and that the works carried out were limited to the minimum measures immediately necessary

(e) That listed building consent ought to be granted for the works, or that any relevant condition of such consent which has been granted ought to be discharged, or different conditions substituted

(f) That copies of the notice were not served as required by Section 38(4)

(g) Except in relation to such a requirement as is mentioned in Section 38(2)(b) or (c), that the requirements of the notice exceed what is necessary for restoring the building to its condition before the works were carried out

(h) That the period specified in the notice as the period within which any step required by the notice is to be taken falls short of what should reasonably be allowed

(i) That the steps required by the notice for the purpose of restoring the character of the building to its former state would not serve that purpose

(j) That steps required to be taken by virtue of Section 38(2)(b) exceed what is necessary to alleviate the effect of the works executed to the building

(k) That steps required to be taken by virtue of Section 38(2)(c) exceed what is necessary to bring the building to the state in which it would have been if the terms and conditions of the listed building consent had been complied with.

In practice the grounds of appeal are likely to be approached in a logical order which (unlike the grounds of appeal under Section 174 of the Town and Country Planning Act 1990) is the order in which they are set out at Section 39 of the LBA, save for ground (f) (defective service) which, where it features, is likely to be taken separately as a free-standing point of appeal.

Similar powers to correct or vary LBENs exist under Section 41 of the LBA as they do in relation to enforcement notices under the Town and Country Planning Act, and also subject to the same restriction that any correction or variation must not cause injustice to either the appellant or the planning authority.

Direct Action

LPAs have powers to enter land to take the step(s) required by the LBEN and recover from the owner of the land expenses reasonably incurred by the authority (Section 42 of the LBA).

Prosecution for Breach of a Listed Building Enforcement Notice

Again, as with enforcement notices under the Town and Country Planning Act 1990, failure to comply with the requirements of a LBEN gives rise to a criminal offence (Section 43 of the LBA). Liability is visited for breach of LBENs only on owners of land, and liability for breach(es) of a LBEN attaches to the person who is the owner at the point of the breach of the LBEN.

The statutory defence available to owners is found at section 43(4) of the LBA:

- That they did **everything** they could be expected to do to secure that all the steps required by the notice were taken; or

- That they were not served with a copy of the listed building enforcement notice and were not aware of its existence.

In relation to the 'second' statutory defence at section 43(4)(b) of the LBA there is no restriction on the defence relating to entry of the LBEN on the LPA's register. The question is simply whether the defendant can show (on the balance of probabilities) that he was not served with a copy of the LBEN and was not aware of its existence.

There is a statutory requirement for a sentencing court to have regard to any financial benefit which has accrued or appears likely to accrue to the defendant(s) in consequence of the breach(es) – see section 43(6) of the LBA.

The elements of the offence which the prosecution must prove are:

- The date by which the LBEN had to be complied with;
- That one or more steps required by the LBEN had not been taken after that date; and
- That the defendant was the owner of the land at the time of the alleged offence – **not forgetting that 'owner' is a defined term under s336(1) of the principal Act**.

Evidence to establish all of the elements above must be produced in a form which is admissible in accordance with criminal rules of evidence and procedure. Disclosure obligations exist. Please refer to chapter 7.1 of this Handbook (Investigations, Evidence, Interviews, and Disclosure) for further guidance on evidence gathering and the conduct of prosecutions.

6.7 Temporary Stop Notices for Listed Buildings (Roderick Morton, Ivy Legal)

LURA introduced a new power to issue a temporary stop notice in relation to works to a listed building which are in breach of the Listed Buildings Act requirements to obtain consent.

The LBTSN may be issued if it is expedient to stop works immediately given the effect of the works on the character of the building. The LBTSN must specify the works, prohibit them, set out reasons and warn of the effect of failure to comply. The notice may be issued to anyone with an interest in the building, any occupier and anyone carrying out the work. A copy must be displayed on site and has immediate effect when so displayed. It ceases 56 days later or whatever shorter period may be specified or when withdrawn. No subsequent notice can be issued until further LB enforcement action is taken. Compensation can be due where a notice is withdrawn.

It is an offence to fail to comply with the LBTSN punishable by fine. The fine is set taking into account any financial benefit the developer has received from the offence. The matter may be tried either in Crown or Magistrates Courts so the fine is unlimited. Defences include that the person did not know about the notice (and could not reasonably have been expected to know) about the notice. There are other defences based on urgency of the work.

6.8 Section 215 Notices (Tom Wicks)

Sections 215 to 219 of the Town and Country Planning Act 1990 give LPAs the power to serve on the owner and occupier of land a notice setting out the steps required to remedy the condition of land (including buildings[4]) which appears to be adversely affecting the amenity of the area.

Examples of the condition of land adversely affecting an area could include overgrown gardens, graffiti, broken or damaged windows, abandoned or unused vehicles or caravans, or derelict properties, though may not include matters of aesthetics or taste such as lawful painting schemes.[5]

A Section 215 notice should not be used as an alternative to a notice under Section 172 of the Act (i.e. an enforcement notice). For example, an enforcement notice (rather than a Section 215 notice) should be used to require the cessation of an unauthorised use[6] (such as the use of a rear garden area to store and process scrap metal).

The Section 215 notice must set out the condition of the land about which the complaint is made and the steps required to remedy that condition with sufficient clarity to enable the recipient to fairly understand exactly what must be done to ensure compliance[7]. In the case of a dwellinghouse garden filled with rubbish and waste for example, the notice should not require the recipient to merely “tidy up the garden”. It should set out the steps required clearly and precisely along the lines of “Remove all rubbish and waste contained in the garden of the dwellinghouse from the Land”. Not only does this enable the recipient to understand what must be done, but removes any ambiguity that may cause subsequent prosecutions for non-compliance or works in default (Section 219) to fail.

As with enforcement notices, there is a right of appeal, which can be exercised by a person served with the notice, or any other person with an interest in the land. Unlike an enforcement notice, however, the appeal is made to the Magistrates’ Court or on further

[4] s336 Town and Country Planning Act 1990
[5] Lisle-Mainwaring, R (On the Application Of) v Isleworth Crown Court & Anor [2017] EWHC 904 (Admin)
[6] Allsop v Derbyshire Dales District Council [2012] EWHC 3562 (Admin).
[7] ibid

appeal to the Crown Court (Section 218). The grounds of appeal are set out at Section 217(1).

It is an offence to fail to comply with the requirements of the notice within the timeframe specified (Section 216). Section 120(2) of the LURA has made the maximum fine unlimited . Once the time for compliance has expired, the LPA may enter the land and take the steps required by the notice (Section 219). In this regard, the reasonable expenses of the LPA can be recovered from the then owner of the land.

Section 215 notices are a useful tool that can be utilised to improve the appearance of the local area, including high streets, residential areas, the countryside, or shopping parades, and should be used accordingly.

6.9 Urgent Works (Historic England)

The owners of listed buildings are under no legal obligation to maintain their property in a good state of repair, even though it is in their interests to do so. When negotiation fails to secure the repair of historic buildings, councils have a range of statutory enforcement powers at their disposal, including Urgent Works Notices, Repairs Notices, Section 215 Notices and other tools and powers under the various Housing, Planning and Building Acts.

Section 54 of the Planning (Listed Buildings and Conservation Areas) Act 1990 enables councils to serve an **Urgent Works Notice**: in order to execute any works which appear urgently necessary for the preservation of a listed building in their area. If the building is occupied, the works may be carried out only to those parts not in use. The owner must be given a minimum of seven days' written notice of the intention to carry out works, and the notice must describe the proposed works. The Secretary of State has reserve powers, and can authorise Historic England to serve a notice and carry out works on their behalf. Section 55 provides for the recovery of the expense of the works from the owner. Section 76 enables the Secretary of State (after consulting with Historic England) to direct that Section 54 powers apply to an unlisted building in a conservation area, if its preservation is important for maintaining the character or appearance of the area.

Section 48 of the LBA enables Councils to serve a **Repairs Notice** on the owner of a listed building specifying those works, which it considers reasonably necessary for the proper preservation of the building. If, after a period of not less than two months, it appears that reasonable steps are not being taken for its proper preservation, the local authority can begin compulsory purchase proceedings under Section 47. A Compulsory Purchase Order requires the Secretary of State's confirmation. The Secretary of State also has reserve powers under sections 47-48.

Urgent Works and Repairs Notices cannot be served in relation to some land and buildings, such as Scheduled Ancient Monuments.

Section 215 of the Town and Country Planning Act 1990 enables Councils to serve notice on the owner and occupier of land whose condition is adversely affecting the amenity of the area. This can be used to secure improvements to the quality of the historic environment. For buildings, this usually means that any remedial works would be confined to improving the appearance of external visible parts. While those works may contribute to the preservation of a building, they may not address the underlying problems, but Section 215 Notices can be served in conjunction with Urgent Works and Repairs Notices.

Further details of available powers can be found in Stopping the Rot: A Guide to Enforcement Action to Save Historic Buildings (Historic England, 2016) and in Listed Buildings and Other Heritage Assets (Mynors and Hewitson. Sweet and Maxwell, 2016).

6.10 High Hedges (Craig Allison)

The law giving councils powers to deal with complaints about high hedges is contained in Part 8 of the Anti-Social Behaviour Act 2003 (the Act), and the High Hedges (Appeals) (England) Regulations 2005 (the Appeal Regulations).

This legislation makes provision for councils to determine complaints by the owners or occupiers of domestic properties who are adversely affected by evergreen (or semi evergreen) hedges over 2m in height. The complainant will have had to have first tried and exhausted all other avenues to resolve the issue before submitting the complaint to the Council. The role of the Council is not to mediate or negotiate between the complainant and the hedge owner but to adjudicate on whether (in the words of the Act) “the hedge is adversely affecting the complainant's reasonable enjoyment of their property”. In doing so, the Council must take account of all relevant factors and must strike a balance between the competing interests of the complainant and hedge owner, as well as the interests of the wider community.

If the Council consider the circumstances to justify it, they may issue a formal notice to the hedge owner which would set out what the hedge owner must do to the hedge to remedy the problem, and by when. The hedge owner and complainant both have the right of appeal to the Planning Inspectorate against the Council’s decision to either issue or not to issue a Notice, as well as appealing the requirements of the Notice (on the basis that they are either excessive or insufficient).

Failure to carry out the works required by the Council is an offence, which on prosecution in the Magistrates’ Court, could lead to a fine of up to £1,000. The Council also has the power to carry out the required works in default if the hedge owner does

not comply with the Notice, and to recover its costs.

Under the terms of the Act, Councils can only consider a complaint if it satisfies the following criteria:

- It must relate to a high hedge as defined in the Act;
- the hedge must be on land that is owned by someone other than the complainant;
- it must be affecting a domestic property;
- the complaint must be made on the grounds that the height of the hedge is adversely affecting the reasonable enjoyment of the domestic property in question; and
- it must be brought by the owner or occupier of that property.

Complaints do not have to be determined within 8 weeks or any set timescale, but clearly they have to be determined within a reasonable period.

Note that evergreens which have gaps above 2m (e.g. top crowned trees) may not always qualify as high hedges if the gaps are such that the complainant's light or view is not affected.

6.11 Community Protection Notice (David Armstrong)

Note that Council Schemes of Delegation will not include delegation of the issuing of Community Protection Notices (CPN's) to Heads of Planning as a matter of course. If you intend using this power, please first ensure that the proper scheme of delegation is in place.

Grounds

Section 43 of the Anti-social Behaviour, Crime and Policing Act 2014 states:

> ***An authorised person may issue a community protection notice to an individual aged 16 or over or a body, if satisfied on reasonable grounds that:***
>
> ***(i) the conduct of the individual or body is having a detrimental effect, of a persistent or continuing nature, on the quality of life of those in the locality; and***
>
> ***(ii) the conduct is unreasonable.***

"Conduct" includes a failure to act (Section 57).

Notices can only be issued if the offender has been given, but has failed to comply with, a written warning (CPW – Community Protection Warning) that the notice will be issued if their conduct does not change. This warning must provide enough time to have reasonably made those changes, which could take place over a period of weeks or minutes (guidance gives the example of almost immediate use in a case of noise).

The CPW is not itself challengeable, but is a precursor to the CPN which is challengeable. The recipient has no right of appeal, or any right to sight of sensitive or confidential information upon which the CPW is based, or of disclosure by way of a freedom of information request. Material given in confidence, material relating to third parties and intelligence upon which further legal action may be based are largely exempt from disclosure. Actual disclosure may be dealt with later as part of any appeal against the notice itself.

The above is particularly important to note, given current feedback nationally that the CPW's are proving extremely effective in achieving compliance in their own right, with very few leading to issue of the formal CPN. It should be noted that there is no specified duration for a CPW. If officers wish to add an element of certainty, they should specify a duration at the point of issue.

A person issued with a CPN who fails to comply with it commits an offence (£2,500 for individuals and unlimited fines for others). A Fixed Penalty Notice (FPN) (£100) is available, as are default works on land open to air, court ordered works by way of a remedial notice and seizure and forfeiture of any items forming the subject of the breach.

Formal Steps

Step 1 – Warning notice (CPW)

Step 2 – CPN

Step 3 – Breach (FPN / prosecution / default action / order to comply / seizure)

Who is an authorised person?

A local authority can be an authorised person. However, before seeking to exercise this power, planning enforcement officers must check their internal scheme of delegation carefully; this is not something that would necessarily fall within a delegation of "planning matters" for instance.

Possible requirements

A CPN imposes any of the following requirements on the individual or body issued with it:

- A requirement to stop doing specified things;

- A requirement to do specified things; and
- A requirement to take reasonable steps to achieve specified results.

The only requirements that may be imposed are ones that are reasonable to impose, in order to:

- Prevent the detrimental effect from continuing or recurring; or
- reduce that detrimental effect or reduce the risk of its continuance or recurrence.

The requirements of a CPN need not only apply to single event issues with a single date set for compliance. This makes them particularly useful for on-going land maintenance and security.

To provide for on-going obligations, and therefore the potential for continuing offences, the CPN must be clear that it is requiring steps to be taken to prevent the detrimental effect from “continuing or recurring” (Section 43(4)(a)) and specifying the “periods within which” (Section 43(8)) these steps are to be taken. A photograph may be attached to illustrate levels to be achieved.

Remedial Action

When a person fails to comply with a CPN, the Council can have work carried out to remedy the failure if on land open to the air (Section 47). Costs may be recovered as a civil debt but there is no direct land charging provision under the Act.

Alternatively, the Court, before which a person is convicted of an offence of failing to comply with a CPN, may make whatever order the Court thinks appropriate for ensuring that what the notice requires to be done is done (Section 49).

There is, however, no provision to allow for issue of an entry warrant. If works are required to be done in default, but access is refused or obstructed, then it may be that officers would need to consider application for a warrant e.g. concerning potential statutory nuisance, in order to gain entry.

Who is Responsible?

Where premises are involved, a person in a position to manage or control the premises may be held liable (Section 44 – Occupiers of premises etc.), unless it is shown that this person cannot reasonably be expected to control or affect the nuisance.

Seizure and Forfeiture

Conviction - A Court before which a person is convicted of breaching a CPN may order the forfeiture of any item that was used in the commission of the offence.

Pre-conviction - Where an offence has been committed under this section, a justice of

the peace can issue a warrant authorising seizure of items used in the commission of the offence (Section 51).

Service (Sections 55 and 45)

Where the detrimental effect arises from the condition or use to which premises have been put, if the authorised person has made reasonable enquiries to find out the name or proper address of the occupier of the premises (or, if the premises are unoccupied, the owner) but without success, he may:

- Post the CPN on the premises; and
- Enter the premises, or other premises, to the extent reasonably necessary for that purpose.

The CPN is treated as having been issued to the occupier of the premises (or, if the premises are unoccupied, the owner) at the time the notice is posted.

In cases of bodies, the CPN may be served on the secretary or clerk of that body. The notice may be served upon a local manager and / or the head office of a company. The statutory guidance provides that it should be issued to the “most appropriate person”.

Appeal (Section 46)

There is a right of appeal to the Magistrates’ Court both for the CPN and any subsequent default notice (the appeal must be made within 21 days of issue).However, any restrictive requirements imposed remain in force pending appeal.

Grounds of appeal are as follows:

- That the conduct specified in the CPN:
    - did not take place
    - has not had a detrimental effect on the quality of life of those in the locality
    - has not been of a persistent or continuing nature
    - is not unreasonable; and
    - is conduct that the person cannot reasonably be expected to control or affect
- that any of the requirements in the notice, or any of the periods within which or times by which they are to be complied with, are unreasonable
- that there is a material defect or error in, or in connection with, the notice; and/or

- that the notice was issued to the wrong person.

CPN vs Planning Legislation

The CPN is *not* an alternative method of enforcing planning control. However, it *is* a very relevant power in circumstances where the issue relates to nuisance which happens also to be of concern in a planning context. The existence of planning permission for an activity does not prevent issue of a CPN.

The CPN can also be effective in supplementing powers in areas traditionally directed towards planning, such as nuisance arising from derelict premises, hoarding, noise from shooting ranges and use of residential premises for business (including Air B'n'B).

Note also that the CPN is not restricted to the boundary of a "planning unit" and attaches to personal **conduct** rather than the particular land in question.

6.12 Completion notices (Roderick Morton, Ivy Legal)

Where development is granted permission and implementation commences within the period conditioned in the permission, there is no breach of planning permission if the site sits incomplete for a long period of time. This can be harmful to the amenity of neighbours. The planning permission remains live indefinitely and work can be recommenced at any time.

LPAs have power, under Section 93H Town and Country Planning Act 1990, to issue a completion notice requiring such a development to be completed. Failure to do so will result in withdrawal of the planning permission in respect of any further part of the development.

There are conditions to the exercise of the power which are set out in Sections 94 and 95:

- The LPA must be satisfied that the development is not likely to be completed within a reasonable period;
- The developer must be given a period of at least 12 months to complete the development; and
- Notice must be given to the landowner, the occupier and anyone else whom the LPA thinks will be affected by the notice.

There is a process for appealing the completion notice to the Planning Inspectorate. Pending an appeal, the notice is suspended. The appeal process is not yet specified but looks similar to that for enforcement notices. The grounds of appeal are:

- That the appellant considers that the development will be completed in a reasonable period;
- That the deadline is unreasonable; and
- That the notice was not served properly.

There are limits to what can be achieved with a completion notice. The notice does not force the developer to complete the work; if not complied with, the notice simply removes permission. The part of the work which has been completed still has planning permission.

6.13 Development Commencement Notice [not yet in force]

LURA introduces a new requirement for developers to give notice to the LPA when they intend to commence work to implement a permission. While the developer can vary the date by further notice at will, failure to provide notice or to provide an updated notice enables the LPA to serve a notice requiring the information to be provided.

Failure to provide the information requested in the information notice within 21 days without reasonable excuse is a criminal offence which can be prosecuted in the Magistrates Court. If found guilty the fine is up to £1,000.

The requirement to give notice of commencement applies only to prescribed types of development. At the time of writing, it is not clear which types will apply.

6.14 Tree Preservation Order Enforcement (Oliver Lawrence, No5 Barristers' Chambers)

Sections 197 – 214 of the Town and Country Planning Act 1990 & The Town and Country Planning (Tree Preservation) (England) Regulations 2012/605

TPO's can be made by LPAs to protect individual trees, groups of trees or woodlands if it is "expedient in the interests of amenity".

Subject to exemptions, the consent of the LPA is required to damage a tree specified in a TPO. The exemptions in England include: works to dead or dangerous trees; dead branches of a living tree; compliance with the requirements of an Act of Parliament; preventing or abating a nuisance; development authorised by a planning permission; cultivation of trees for fruit in the course of a business or trade; and felling authorised by a felling licence. Works to dying trees are no longer an exemption. Unless work is urgently necessary because there is an immediate risk of serious harm, five working

days prior written notice must be given to the LPA before carrying out work on a dead tree. Dead branches may be removed from a living tree without notice.

Trees in conservation areas which are not subject to a TPO receive interim protection by a requirement that notice is served on the LPA six weeks before they are damaged or destroyed, subject to the same exemptions above. The six-week notice period gives the LPA time to decide whether to make a TPO.

Section 210(1) provides that a person commits an offence if that person, in contravention of a TPO, cuts down, uproots or wilfully destroys a tree; or wilfully damages, tops or lops a tree in such a manner as to be likely to destroy it. The prosecution must prove that the tree was subject to a TPO; the defendant carried out the activities in Section 210(1); and the activities were in contravention of the order. It is for the defendant to prove that any exemption applies. This offence incurs an unlimited fine.

Section 210(4) provides that a person commits an offence if they contravene the provisions of a TPO otherwise than as mentioned in Section 210(1). This includes damage that is not likely to destroy the tree. Proceedings may be brought for this offence within six months of the date on which the prosecutor had sufficient evidence to justify the proceedings, provided the prosecution is brought within three years of the date of the offence.

Section 206 imposes a duty on landowners to replant trees destroyed in contravention of a TPO. The LPA may serve a notice under Section 207 requiring replanting within four years of the breach. Section 207 notices can be appealed on various grounds and failure to comply with their terms is not an offence. LPAs can, however, enter the land and plant the trees, recovering the cost from the owner if a Section 207 notice is not complied with. Persons authorised by the LPA are also given powers of entry in connection with Section 210 and 211 offences.

LPAs can apply for an injunction under Section 214A if they consider it necessary or expedient to restrain an actual or apprehended offence under Section 210 or Section 211.

6.15 Advertisement enforcement (Scott Stemp, No5 Barristers' Chambers, and Tom Wicks)

Town and Country Planning (Control of Advertisements) (England) Regulations 2007 & Town and Country Planning (Control of Advertisements) Regulations 1992

Section 220 of the Town and Country Planning Act 1990 provides for control of advertisements to be governed by regulations discrete from the Act. Advertisement

control in the hands of planning authorities extends to restricting or regulating the display of advertisements as appears expedient in the interests of amenity or public safety (Section 220(1) of the Act). Planning permission is not required for advertisements which comply with the relevant regulations (Section 222 of the Act).

In England the relevant regulations are the Town and Country Planning (Control of Advertisement) (England) Regulations 2007 (the 2007 Regs).

"Advertisement" is a defined term within the Act at Section 336(1):

> ***any word, letter, model, sign, placard, board, notice, awning, blind, device or representation, whether illuminated or not, in the nature of, and employed wholly or partly for the purposes of, advertisement, announcement or direction, and (without prejudice to the previous provisions of this definition), includes any hoarding or similar structure used, or adapted for use, for the display of advertisements, and references to the display of advertisements shall be construed accordingly***

Various classes of advertisements are *excluded* from operation of the Regulations. These are defined at Schedule 1 to the 2007 Regs (Classes A to I).

A variety of forms of advertisements benefit from *deemed consent* – there is no need to obtain an express grant of consent, however consent may be removed by direction or a discontinuance notice. The classes of advertisement, which benefit from deemed consent (and any conditions or limitations applied to the same) are set out at Schedule 6 to the 2007 Regs (Classes 1 to 17).

Advertisements which are neither excluded from the operation of the regulations, nor which benefit from deemed consent, require an *express grant of consent*. An express grant of consent is ordinarily for a period of five years unless some other period is specified in the grant. Express grants of consent may also be made subject to conditions by the planning authority.

Areas of Special Control

A planning authority may (with approval of the Secretary of State) define "Areas of Special Control". If such an order is in force then the extent of advertisements which may be displayed in the area is restricted. Areas of Special Control are designated expressly on amenity grounds only, and not with regard to considerations of public safety.

Enforcement of Advertising Controls - Discontinuance Notices

In relation to advertisements displayed with deemed consent, a planning authority may serve a discontinuance notice.

In England, Regulation 8 of the 2007 Regs requires only that a discontinuance notice be served on "*the advertiser*" however this is defined in Regulation 2 of the 2007 Regs as:

> ***"advertiser", in relation to an advertisement, means—***
>
> > ***(a) the owner of the site on which the advertisement is displayed;***
> >
> > ***(b) the occupier of the site, if different; and***
> >
> > ***(c) any other person who undertakes or maintains the display of the advertisement;***
>
> ***and any reference in these Regulations to the person displaying an advertisement shall be construed as a reference to the advertiser***

Requirements of service are those at Section 329 of the Act (see chapters on Enforcement Notices/Listed Building Enforcement Notices for details of the requirements surrounding service of notices).

Enforcement of Advertising Controls - Prosecution

As is set out in the Act, considerations of expediency in advertising controls relate only to matters of amenity and public safety. If the planning authority has given assurances that no advertising consent is required, it is likely an abuse of process for the authority to then seek to prosecute for displaying an advertisement without consent in circumstances where the defendant has relied upon the authority's assurances.

It is for the prosecution to prove the display of the advertisement. The standard of proof is that the Court must be satisfied so that it is sure. If authorisation is pleaded by the defence, the burden shifts to the defence to show, on the balance of probabilities, that authorisation exists (whether by way of deemed or express consent, or exclusion from the regulations). The defence is made out if the defence can show, on balance, the existence of a consent. A genuine or honest belief on the part of the defendant that the advertisement had consent is not enough to make out the defence.

Statutory assumptions may assist the prosecution in proving the offence – see Section 24(4) of the Act:

> ***(4) Without prejudice to the generality of subsection (3), a person shall be deemed to display an advertisement for the purposes of that subsection if—***
>
> ***(a) he is the owner or occupier of the land on which the advertisement is displayed; or***
>
> ***(b) the advertisement gives publicity to his goods, trade, business or other concerns***

However, the assumptions above should not be relied upon in pursuing an offence contrary to Section 224 because of the restriction on the extent of the assumption set out at Section 224(5) and (6):

> ***(5) A person shall not be guilty of an offence under subsection (3) by reason only—***
>
> ***(a) of his being the owner or occupier of the land on which an advertisement is displayed, or***
>
> ***(b) of his goods, trade, business or other concerns being given publicity by the advertisement,***
>
> ***if he proves either of the matters specified in subsection (6).***
>
> ***(6) The matters are that—***
>
> ***(a) the advertisement was displayed without his knowledge; or***
>
> ***(b) he took all reasonable steps to prevent the display or, after the advertisement had been displayed, to secure its removal.***

Time Limits

Breach of advertising controls under either set of regulations does not constitute a breach of planning controls for the purposes of Section 171B of the Act and time limits for taking enforcement action, however there are time limits on the commencement of criminal proceedings for breach of advertising controls.

In England the limit on the commencement of criminal proceedings is governed by Section 224(7) and (8):

> ***(7) Proceedings for an offence under subsection (3) may be brought within the period of 6 months beginning with the date on which evidence sufficient in the opinion of the prosecutor to justify the proceedings came to the prosecutor's knowledge.***
>
> ***(8) Subsection (7) does not authorise the commencement of proceedings for an offence more than 3 years after the date on which the offence was committed***

Section 224(9) and (10) provide that the prosecutor may certify the date relevant to Section 224(7).

The penalty is a financial penalty. However on conviction, if there is financial benefit from the criminal offending, then a prosecutor may consider exercising powers to seek confiscation orders pursuant to the Proceeds of Crime Act 2002 (POCA). Such a course of action requires committal of the case to the Crown Court (Section 70 POCA) prior to

sentence. See section on confiscation (Section 7.3).

Other Controls

Planning authorities also have powers to obliterate or remove placards or posters which are displayed in contravention of Section 220 (see Section 225) of the Town and Country Planning Act 1990. Such powers may not be exercised without giving notice in writing to any person who displayed the advertisement or who caused it to be displayed. There is potential liability in compensation to persons suffering damage from the authority exercising their powers to enter land (but not in relation to the person displaying or causing the display of the advertisement).

Authorities in England benefit from extended powers, in outline being:

- Section 225A – power to remove and dispose of structures used for unauthorised displays of advertising, by service of written notice. Powers to take “direct action” to enforce any such notice are contained within Section 225A as are powers to recover costs of the same.
- Section 225B – contains provisions for any appeal against a Section 225A notice. Appeal is by way of specified grounds and is made to the Magistrates’ Court.
- Section 225C – remedying persistent problems with unauthorised advertisements; also by way of written notice and with powers to take “direct action” and associated costs recovery.
- Section 225D – contains provisions for any appeal against a Section 225C notice. Appeal is by way of specified grounds and is made to the Magistrates’ Court.
- Section 225E – contains provisions for the application of Section 225C to statutory undertaker’s operational land.
- Section 225F – power to remedy defacement of premises, by service of written notice. This power is limited to the surface that is readily visible from a place to which the public has access, does not form part of the operational land of a statutory undertaker (or if it does, the surface abuts a street or place to which the public has access), there is a sign on the surface and the authority consider the sign to be detrimental to the amenity of the area or offensive. Powers to take “direct action” and for costs recovery are dealt with in Sections 7.4 and 5.6 respectively. Note that this power extends only to a “sign” which includes any writing, letter, picture, device or representation, **but does not include an advertisement.**
- Section 225G – extends the power to serve a Section 225F notice on a universal postal service provider in respect of a universal postal service letter box or universal post service pouch box belonging to the provider.

- Section 225H – extends the power to serve a Section 225F notice in relation to bus shelters or street furniture of a statutory undertaker which is not situated on operational land of the statutory undertaker.
- Section 225I – contains provisions for any appeal against a Section 225F notice. Appeal is by way of specified grounds and is made to the Magistrates' Court.
- Section 225J – makes provision for the owner or occupier of premises to ask the planning authority to remove a sign on the surface of those premises, where the surface is readily visible from a place to which the public have access.
- Section 225K – makes provision for the procedures to be followed where a planning authority intends to exercise powers under Sections 225A, 225C or 225F on operational land belonging to a statutory undertaker.

Section 7: Securing compliance with notices

7.1 Investigations, Evidence, Interviews, and Disclosure (Scott Stemp, No5 Barristers' Chambers)

Police and Criminal Evidence Act 1984 & Criminal Procedure and Investigations Act 1996

It is important to remember that site investigations may well lead to criminal prosecutions, which are subject to a much stricter regime of rules concerning admissibility of evidence than ordinarily encountered in planning appeals, or even when pursuing planning injunctions or other civil orders.

The primary areas, which those involved in a potential enforcement investigation, should be aware of are:

- Cautions;
- Interviews;
- Hearsay; and
- Disclosure.

The reason why it is important to be aware of these areas from the beginning of an investigation, is that failure to comply with the requirements of the above can have significant consequences for any enforcement action later on. These can range from exclusion of pieces of evidence from a trial through to the stopping or collapse of an entire case because of non-compliance with evidential and procedural requirements.

Investigators would do well to bear in mind a number of points, which will help to improve the quality of any case later brought to Court, as follows:

- Consider if what this person is saying something which you might later want to use in Court. If so, you should be thinking about cautions, and making contemporaneous notes of the conversation;
- Consider if what you are being told, or the document you are looking at, is hearsay. If so, is there a better direct source of the evidence?;
- Are there other reasonable lines of enquiry you could pursue? If you are conducting a criminal investigation, you are under an obligation to pursue all reasonable lines of

enquiry whether they lead toward or away from any particular individual; and

- Have you made a contemporaneous record of everything that has occurred?

Cautions

Cautions (and interviews) are governed in large part by the provisions of the Police and Criminal Evidence Act 1984 ('PACE') and Codes of Practice issued thereunder. The Codes of Practice ('PACE CoP') are (on occasion) updated and are freely available online.

Failure to comply with a relevant requirement of PACE or a PACE CoP may lead to evidence being excluded. In some circumstances it may lead to a case being stopped entirely.

PACE CoP likely to be relevant to planning prosecutions are:

- **Code C** (questioning of suspects) – revised version effective from 21 August 2019;
- **Code E** (audio recording of interviews with suspects) – revised version effective from 31 July 2018; and
- **Code F** (visual recording of interviews (with sound) of suspects) – revised version effective from 31 July 2018.

The wording of the caution is:

> ***You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence***

If it appears that a person does not understand some (or all) of the caution, then the person giving the caution must explain it in their own words (see PACE CoP Code C Note 10D).

When must a caution be given? Per PACE CoP Code C 10.1 (as at February 2020):

> ***10 Cautions***
>
> ***(A) When a caution must be given***
>
> ***10.1 A person whom there are grounds to suspect of an offence must be cautioned before any questions about an offence, or further questions if the answers provide the grounds for suspicion, are put to them if either the suspect's answers or silence (i.e. failure or refusal to answer or answer satisfactorily) may be given in evidence to a court in a prosecution. A person need not be cautioned if questions are for other necessary purposes, e.g.:***

(a) solely to establish their identity or ownership of any vehicle;

(b) to obtain information in accordance with any relevant statutory requirement, see paragraph 10.9;

(c) in furtherance of the proper and effective conduct of a search, e.g. to determine the need to search in the exercise of powers of stop and search or to seek co-operation while carrying out a search; or

(d) to seek verification of a written record

A "person of whom there are grounds to suspect of an offence" is a person of whom you have *reasonable* grounds to suspect has committed (or is involved in the commission of) an offence. PACE CoP Code C Note 10A clarifies:

10A There must be some reasonable, objective grounds for the suspicion, based on known facts or information which are relevant to the likelihood the offence has been committed and the person to be questioned committed it.

Broadly, if you have reasonable, objective grounds to suspect a person has committed an offence and you wish to ask questions of them, the answers to which (or failure to answer) you would want to use in court, you must issue a caution before asking those questions. Failure to do so puts at risk the ability of a prosecution to rely on any answers given (or silences in response to questions asked).

Any significant statements or silences[10] made by a suspect (whether before or after issuing the caution and whether solicited or not) should be recorded in writing (including the time of the comment(s)) and the record offered to the suspect for signing as an accurate record of what was said. If the suspect refuses to sign the record, then this refusal should be recorded. If a contemporaneous note cannot be made and offered for signing, a note must be recorded as soon as possible and the reason(s) for not making an earlier note recorded.

Interviews

An interview is the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences, which, under paragraph 10.1, must be carried out under caution.

Before a person is interviewed, they and (if they are represented) their solicitor must be given sufficient information to enable them to understand the nature of any such

[10] See "interviews" below and PACE CoP Code C 11.4A

offence, and why they are suspected of committing it, in order to allow for the effective exercise of the rights of the defence. However, whilst the information must always be sufficient for the person to understand the nature of any offence, the decision about what needs to be disclosed for the purpose of this requirement therefore rests with the investigating officer who has sufficient knowledge of the case to make that decision. The officer who discloses the information shall make a record of the information disclosed and when it was disclosed. This will also need to be recorded in due course on the Schedule of Unused Material.

PACE CoP Code C 11.4 imposes strict requirements on the conducting of interviews where a suspect has previously made a "significant statement or silence". A significant statement or silence is (per PACE CoP C 11.4A):

> ***11.4A A significant statement is one which appears capable of being used in evidence against the suspect, in particular a direct admission of guilt. A significant silence is a failure or refusal to answer a question or answer satisfactorily when under caution, which might, allowing for the restriction on drawing adverse inferences from silence…give rise to an [adverse inference in court]***

An interviewer must (after cautioning a suspect) put to them any significant statement or silence which occurred in the presence and hearing of an investigator before the start of the interview and which has not been put in any previous interview. The interview must ask whether they confirm or deny making the significant statement or silence.

An interview **must cease** (PACE CoP Code C 11.6) when:

- The officer in charge of the investigation is satisfied all the questions they consider relevant to obtaining accurate and reliable information about the offence have been put to the suspect, this includes allowing the suspect an opportunity to give an innocent explanation and asking questions to test if the explanation is accurate and reliable, e.g. to clear up ambiguities or clarify what the suspect said;
- The officer in charge of the investigation has taken account of any other available evidence; and
- The officer in charge of the investigation reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for that offence.

PACE CoP Codes E and F govern the audio and/or visual recording of interviews and handling of media used for the same.

Hearsay

Hearsay remains one of the most problematic areas for planning enforcement prosecutions, largely because it is a form of evidence which is regularly admitted in

many other areas of enforcement (including civil court proceedings) but remains subject to controls and restrictions on admissibility in criminal proceedings.

Hearsay is, effectively, any representation of fact or opinion made by a person other than in oral evidence in the course of proceedings.

In practice it manifests most often in letters, emails, notes of conversations or other information, site visit notes, business records (e.g. invoices) or information passed on from another source (e.g. "*Mrs Smith told me that she saw*…"). It also includes the contents of any witness statement.

The basic rule in criminal proceedings is that hearsay evidence is not admissible unless it can be brought within one of the exceptions to the bar on such evidence. An investigator would do well to work from the starting presumption that hearsay evidence will not be admitted. If your investigation is reliant upon hearsay evidence then, dependent upon the nature of the source and how central that evidence is to your case, you would be well advised to seek another (non-hearsay) source of that evidence.

There is no power to admit anonymous hearsay as evidence.

The main exemptions relevant to planning investigations and prosecutions are likely to be:

- Business records; and
- Where a witness is unavailable

Business Documents

Mostly this will concern ordinary business records prepared in the course of the ordinary running of a business (and not records created for the purposes of contemplated or pending criminal proceedings). Where:

- The document (or the part containing the pertinent statement) was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and
- Where the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with; and
- Each person (if any) through whom the information was supplied from the relevant person to the person mentioned above received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office, then the hearsay business record *may* be admissible; **unless**
- The court directs that it is satisfied that the document's reliability is doubtful,

considering its contents, its source, and/or the circumstances in which the document (or the information within it) came to be supplied.

In practice most ordinary business records are likely to fall within this category and be admissible unless the court forms the view that the reliability of the document is doubtful. If the court has concerns about how the document comes to be in the possession of the prosecution, or how the information within the document comes to be supplied, then it will remain inadmissible. Where investigators obtain hearsay documents then they should keep a detailed record of how they came to possess the document and the circumstances surrounding the same. As much information about the provenance of any hearsay document should be recorded, since this all may be relevant to the admissibility of the document (and likely will be information which should be disclosed to the defence).

Where a document is prepared within (or in contemplation of) criminal proceedings there are additional requirements placed on the admissibility of that document. In these circumstances you should seek advice on the document you intend to rely on as hearsay evidence.

Absent Witnesses

A witness statement is a hearsay document. Where the defence agree that a statement may be read to the court, then the contents of the statement become evidence. However where a witness' evidence is not agreed, the witness statement(s) given are not automatically admissible. Where:

- The witness is dead;
- The witness is unfit to be a witness because of a bodily or mental condition;
- The witness is outside of the UK and it is not reasonably practicable to secure their attendance at trial;
- The witness cannot be found although reasonably practicable steps have been taken to find them; or
- The witness does not give evidence through fear.[11]

then the prosecution may, subject to detailed criteria, seek to admit that person's witness statement(s) as evidence.

These are far from 'automatic' triggers to admissibility and each imposes additional requirements on investigators. In all circumstances evidence supporting the basis of

[11] Including fear of death or injury of another person, or of financial loss

admissibility sought is required.

A statement from a doctor that 'it would be in the best interests of the witness if she were able to submit written evidence' is not equivalent to proof that the witness is unfit to attend because of a bodily or mental condition. It is not sufficient. Note that a doctor's *letter* (cf. statement) asserting anything in relation to a witness' condition will itself be hearsay and prepared for the purposes of criminal proceedings.

The words "reasonably practicable" involve consideration of steps, which would ordinarily be taken to secure the attendance of a witness, including the cost and other steps which may be available to secure the witness' attendance. This may also be relevant where circumstances occur at short notice, which mean it becomes impracticable to secure the attendance of the witness when they were originally required to give evidence, even where previous arrangements had been made. Admissible evidence will be required to show that the witness is outside of the UK and that it is not reasonably practicable to secure their attendance.

Where it is claimed that a witness 'cannot be found' the Court of Appeal has ruled[12] that it was not sufficient to tell a witness of a trial date four months earlier and then leave contacting them again until the last working day before that day. Nor was it sufficient simply to leave a voicemail message when they did not answer their mobile telephone. The Court's view was that those responsible for getting witnesses to court should take account of the fact that it is notorious that witnesses are not invariably organised people with settled addresses who respond promptly to correspondence and messages that often they do not want to come to court. Even if they are willing, they may not accord the commitment the priority it warrants, but that even if they do it is very foreseeable that something (holidays, work, illness being routine examples) may intervene to push the matter out of their minds or to cause a clash of commitments. Admissible evidence of the steps taken to secure a witness' attendance will be required.

Where a witness is said to be refusing to give evidence because they are in fear, the court must be satisfied that there is a causative link between their fear and their failure or refusal to give evidence.

It is expected that every effort be made to get the witness to court to give evidence to the fact that they do not wish to give evidence through fear (including being given assistance by 'special measures' such as screens, or video links) since a witness alleging fear may be cross-examined by the defence about the same. If the defence are unable to test the 'fear' by cross-examination then it is incumbent on the court to fully investigate and test the evidence of 'fear' and whether any special measures would

[12] *R. v. Adams* [2007] EWCA Crim 3025

suffice. Evidence on the 'fear' is plainly required in these circumstances.

It is vital that a potential witness is, at no point, given any indication or assurance that their evidence may be read to the court if they are afraid of giving evidence in court in person.

Disclosure

Disclosure is a regime governed by the Criminal Procedure and Investigations Act 1996 (CPIA) and disclosure is the means by which a defendant achieves a fair trial. **Failures in disclosure are likely to result in a trial being stopped, or any conviction later quashed.**

Disclosure concerns unused material – i.e. material held by (or known to) the prosecution which does not form the basis of the prosecution (i.e. it is not the prosecution witness statements, or exhibits).

When a defendant is charged with an offence, the prosecution is **required** to provide the defendant with any material obtained by the prosecution in the course of the investigation which:

- Might reasonably be expected to undermine the prosecution; or
- Might reasonably be expected to assist the defence.

This is not limited to material which might show the defendant's innocence, but also includes material which might assist a defendant in any mitigation. **Investigators are under an obligation in the course of any investigation to pursue all reasonable lines of enquiry, whether they lead towards or away from any given person.** If you become aware of a potential issue in a case (for example counter-allegations made by a suspect about things said or done by others) then investigators are under an obligation to pursue reasonable lines of enquiry in relation to the same. Failure to pursue reasonable lines of enquiry may result in adverse comment or criticism of you or the prosecuting authority; it can also potentially lead to cases being stopped.

Once you are engaged in a *criminal* investigation, it is rarely (if ever) the case that information can be withheld either from you (or eventually the defence) "*because of data protection*". Requiring the provision of information as part of a criminal investigation is ordinarily an exemption to protections afforded by data protection legislation. Note however that the protection afforded to *legally privileged materials* (typically communications between lawyers and their clients) ordinarily remains in place, even in criminal investigations.

In a multi-defendant case, disclosure must be considered for each defendant individually.

Once you are conducting a criminal investigation[13] **investigators are required to retain all material in the investigation**. This includes any plans, reports, letters, emails etc. which are obtained or received by investigators. It also includes material generated by investigators or others – such as site visit notes, draft witness statements, photographs, notes/memos of telephone conversations, notes made of conversations with suspects or witnesses, notes made in preparation for any interview under caution or any notes made in the course of any such interview. It includes your original site visit notes, not just later transcriptions of notes into any computer system (both the original note and the computerised record must be retained for disclosure purposes).

All material considered in the course of the investigation which is not part of the prosecution case (i.e. is not an exhibit in the case) must be entered into a Schedule of Unused Material. Unless it is part of the prosecution case (and is not sensitive information – see below) it **must** be recorded on the Schedule of Unused Material. The Schedule **must** be given to the prosecution legal team and **must** also be disclosed to the defence once the case reaches court. One investigator should take on the responsibility of being the 'disclosure officer' whose job it is to compile the Schedule and to review material for disclosure.

You are required to draw the prosecution legal team's attention to any material on the Schedule, which you (as the investigator) believe may be likely to meet either of the tests above.

Disclosure is an ongoing duty throughout the life of a case; the duty to review disclosure and make further disclosure continues. For example, the issues in a case when it first arrives at court may develop as the case develops, and either before trial (or even in the course of a trial) new issues may arise, or existing issues change, so that previously undisclosed material becomes relevant. Disclosure must be continually reviewed by the prosecution and any material falling within either 'limb' (that which might reasonably be expected to undermine the prosecution, or that which might reasonably be expected to assist the defence) must be disclosed.

You are likely to be criticised in court, and the prosecution put at risk, if:

- Unused material has not been retained;
- The Schedule of Unused Material is incomplete or inadequate;
- Timely disclosure is not made of material which should be disclosed (whether initially or as the case progresses); or

[13] This is an investigation which is being conducted with a view to ascertaining whether a person should be charged with an offence, or whether a person is guilty of an offence

- You do not pursue reasonable lines of enquiry, **whether they lead towards or away from** any given person.

Sensitive Material

In the context of a planning prosecution it is unlikely that 'sensitive material' will be involved. Where it is however, this is most likely to be in the form of the identity of an informant who does not provide a witness statement and who does not wish to be identified as the source of the initial complaint.

Sensitive information (such as the identity of informants who are not identified as such) must be recorded in a separate "Schedule of Sensitive Unused Material" and this must be brought to the attention of the prosecution legal team. You are required to indicate to the prosecution legal team whether you believe any of the material meets either of the tests for disclosure. Sensitive information may still be required to be disclosed if it meets either of the tests for disclosure. It is not exempt from disclosure just because it is sensitive. If sensitive material should be disclosed (because it meets one of the tests for disclosure) but the prosecution does not wish to make disclosure, then the prosecution legal team will have to make an application to the court to withhold that information – called Public Interest Immunity. If this situation arises, you must flag this for your legal team immediately.

7.2 Prosecutions (Scott Stemp, No5 Barristers' Chambers)

Planning enforcement brings planning matters before the criminal courts. Examples of criminal offences created under the primary Act are:

- Failure to comply with a Section 171C PCN (Section 171D(1) Town and Country Planning Act 1990);
- Knowingly or recklessly making a false or misleading statement in response to a Section 171C PCN (Section 171D(5) Town and Country Planning Act 1990);
- Breach of a Temporary Stop Notice (Section 171G Town and Country Planning Act 1990);
- Failure to comply with an enforcement notice (Section 179 Town and Country Planning Act 1990);
- Reinstating works contrary to an enforcement notice (Section 181 Town and Country Planning Act 1990);
- Breach of a Stop Notice (Section 187 Town and Country Planning Act 1990);
- Breach of a discontinuance/alteration/removal notice (Section 102, Schedule 9 and

Section 189 Town and Country Planning Act 1990);

- Making a false statement to procure a decision on an application for a Certificate (Section 194 Town and Country Planning Act 1990);
- Obstructing a person exercising a right of entry (Section 196C(2) Town and Country Planning Act 1990);
- Disclosing information as to a manufacturing process or trade secret obtained in the course of exercising a right of entry (Section 196C(5) Town and Country Planning Act 1990);
- Breach of a TPO (Section 210 Town and Country Planning Act 1990);
- Obstructing a person exercising a right of entry relating to TPO's (Section 214D Town and Country Planning Act 1990);
- Failure to comply with a Section 215 Notice (Section 216 Town and Country Planning Act 1990);
- Displaying an authorised advertisement (Section 224 Town and Country Planning Act 1990);
- Failure to comply with a Section 330 request for information (Section 330(4) Town and Country Planning Act 1990);
- Knowingly making a misstatement in response to a Section 330 request for information (Section 330(5) Town and Country Planning Act) 1990; and
- Offences committed by directors, managers, secretaries or similar officers of bodies corporate (Section 331 Town and Country Planning Act 1990).

Those involved in planning enforcement can also expect to find themselves involved in the prosecution of offences under other legislation also, for example those under the LBA, offences under The Conservation of Habitats and Species Regulations 2017 (SI 2017/1012), offences under the Planning (Hazardous Substances) Regulations 2015 (SI 2015/627), offences under the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016/1154) and many, many others.

All offences will start in the Magistrates' Court and most will finish there. Some will progress to the Crown Court. In the Magistrates' Court cases are heard either by a lay Bench, usually of three lay people (advised by a qualified legal advisor) or by a District Judge (or Deputy District Judge) who will themselves be a qualified legal professional. In the Crown Court cases are presided over by a Circuit Judge or Recorder, and trials are heard by juries. Not all cases can go to the Crown Court and this is determined by the law(s) which create the offence in question, however all cases where there has

been financial gain can go to the Crown Court for confiscation where appropriate. Cases where the prosecution seek confiscation under POCA must go to the Crown Court, since the Magistrates' Court has no power to make a confiscation order.

Authorisation of Prosecution

All prosecutions must meet both limbs of a test set out in the Code for Crown Prosecutors. In all prosecutions there must be:

- Evidential sufficiency – sufficient admissible evidence that there is a realistic prospect of conviction; and
- Public interest – it must be in the public interest to prosecute.

If either of these tests is not met, then a prosecution cannot be brought. A prosecutor must keep both limbs under review throughout the life of any case. The decision on whether either limb is met is a legal decision, and ultimate responsibility for that decision rests with the prosecution advocate in court.

If the LPA has an enforcement policy which addresses the circumstances in which a prosecution will be brought, then a decision to prosecute must also be in accordance with the requirements of that policy.

The Court of Appeal has clearly stated that the possibility of pursuing confiscation proceedings should play not part in the decision to prosecute[14].

If the possibility of a POCA order being made does feature in the determination to prosecute by a local authority then there is a risk that the court will stay the prosecution as an abuse of process.

Evidence

All evidence before the criminal courts (whether Magistrates' Court or Crown Court) must comply with criminal rules of evidence and procedure – see Section 7.1 (above). Inadmissible evidence cannot be considered when applying the test of evidential sufficiency.

Commencement and Course of a Prosecution

Prosecutions are commenced by the LPA laying charges with a Magistrates' Court (laying an Information). Once an Information has been laid, a Summons can be issued requiring a defendant to attend court.

On first attendance at a Magistrates' Court defendants will be asked to plead guilty or

[14] Wokingham Borough Council v. Scott and others [2019] EWCA Crim 205

not guilty, and this will determine the future course of the case.

On a guilty plea the court will normally proceed to sentence, unless there is a reason to adjourn sentence to another date (perhaps in order to give defendants a further opportunity to comply) or there is a need to send the case to the Crown Court for sentence (e.g. where a confiscation order is to be sought). The prosecutor will outline the facts of the offence to the court, address any aggravating circumstances and any relevant sentencing guidelines, and normally seek the LPA's costs. The defence will enter a plea in mitigation, usually addressing the defendant's means, following which the court will proceed to sentence.

On a plea of 'not guilty' (or if the defendant declines to enter a plea, which the court will presume is a plea of 'not guilty') then the court will ask what type of offence is being pursued. If it is the type of offence which can only be tried in the Magistrates' Court (a 'summary offence') then the court will give directions to allow a trial to take place, often several weeks or months after the first hearing.

If it is the type of offence that could be heard either in the Magistrates' Court or the Crown Court then the court will proceed to determine the 'mode of trial' – the prosecutor will outline the facts of the allegations and explain whether there are any novel or complex points of fact or law, and the defence can make submissions on the same, following which the court will decide if it stays in the Magistrates' Court for trial or is sent to the Crown Court for trial. Once the court has decided, the defendant then gets to choose whether it stays in the Magistrates' Court or whether they 'elect' trial by jury in the Crown Court. The defendant's choice is absolute and the court cannot override it. If the trial stays in the Magistrates' Court then directions for trial are given; if it goes to the Crown Court then the defendant is sent to the Crown Court where another hearing will take place to set directions for the trial there.

Role of the Investigator

As well as investigating the offence(s) the investigator has a number of other duties in the life of a case at court. An investigator will also likely have to be the disclosure officer - see Section 7.1 on disclosure (above). They will be responsible for compiling the Schedules of Unused Material and the initial review of material for disclosure. An investigator will also have to be the 'officer in the case' (OIC) whose task will be to be the primary point of contact for the prosecuting legal team with any queries about the case, any requests for further investigative steps, and to deal with practical and logistical requirements of the case (liaising about witness requirements and attendances, production of exhibits etc.) and to give evidence in court on the conduct of the investigation, if that is a live issue between the prosecution and defence.

7.3 Confiscation: Proceeds of Crime Act 2002 (Scott Stemp, No5 Barristers' Chambers)

Confiscation orders are orders which criminal courts may make after conviction (whether by guilty plea or after trial) alongside any other penalty imposed for the offence. The purpose of a confiscation order is to seek to remove financial benefit which a defendant has made from their criminal offending.

POCA *may* be used in any criminal offence where financial gain has occurred, although it does not *have* to be used. The key indicator for those engaged in enforcement investigations will be where a defendant is generating an income from their offending, or will end up with a valuable asset as a result.

Typically, confiscation will arise as part of a prosecution for breach of an enforcement notice, although it is not limited to this form of prosecution. Prosecutions for unauthorised works to listed buildings (where a defendant has ended up gaining financially, including avoiding costs they would have otherwise incurred), or in relation to tree preservation matters (where the offending results in financial gain) or breach of advertising controls are all planning offences where financial gain connected with the offending is not uncommon.

Because confiscation orders will ordinarily match the value of receipts (not profit) arising from criminal offending, the sums involved can become substantial. Monies ordered to be paid under a confiscation order are normally to be paid within three months, and failure to pay often results in a period of imprisonment being activated. Unlike court fines however, serving the term of imprisonment does not expunge the liability to pay the confiscation order.

Prosecutors also have other powers available to them under POCA, including orders to freeze bank accounts, property, or other assets ('restraint orders') and powers to seek a court-appointed enforcement receiver to seize and sell property held by the defendant.

The Home Office Asset Recovery Incentivisation Scheme (ARIS) applies to sums ordered to be payable under confiscation orders, meaning that a LPA which is investigator and prosecutor will keep 37.5% of sums ordered payable under confiscation orders in their cases.

Confiscation investigations are specialist investigations which will require the use of an Accredited Financial Investigator (AFI). Many local authorities already employ their own financial investigators, or have Memoranda of Understanding in place with other authorities (or sometimes their Constabulary) to 'share' their Financial Investigator.

The role of the planning enforcement officer is:

- To identify whether the case they are investigating concerns financial gain or benefit

as a result of any offending behaviour;

- To advise the prosecution legal team immediately if such a case arises and there appears a genuine risk of dissipation of assets; and
- To advise and assist the financial investigator in preparing the prosecutor's "Section 16 POCA" statement setting out financial benefit, particularly in relation to the extent of offending behaviour and any costs likely avoided.

Basic Structure of Confiscation

Confiscation orders follow a basic structure. On conviction (but before sentence) the prosecutor will tell the court that they want to begin confiscation proceedings under POCA. If the case is already at the Crown Court, the court will proceed to give directions and set a timetable for confiscation; if the case is before the Magistrates' Court then it will need to be sent to the Crown Court for confiscation – the Crown Court is the only court with power to make confiscation orders.

At the Crown Court, the court will direct the defendant(s) to disclose their financial information to the prosecution under Section 18 POCA. The financial investigator will almost certainly have already obtained 'production orders' from the court and obtained most (if not all) of the defendant's known financial information (in the form of bank accounts, loans, credit cards etc.). The disclosure made by defendants under Section 18 POCA can be compared to this.

Once the prosecution has all relevant financial information the financial investigator will produce a 'prosecutor's statement' pursuant to Section 16 POCA. This will set out the prosecution case on financial gain and will identify:

- The defendant's financial gain from the particular offending behaviour the subject of the charge(s)
- Where relevant, any wider financial gain assumed to come from criminal behaviour over the six years preceding the laying of the current charge(s); and
- What assets the defendant has to satisfy any confiscation order made.

Following receipt of the prosecutor's Section 16 statement the defence will respond with a defendant's Section 17 POCA statement, identifying which elements of the prosecutor's statement they agree or disagree. Further evidence/information may also be provided in response to the Section 16 POCA.

The prosecutor may produce a final reply to the defence response (or may not). If an order can be agreed, it can be presented to the court as an agreed (uncontested) confiscation order – although the court is not bound to accept an agreement between the parties.

If an order cannot be agreed, or if the court does not accept the agreement between the parties, a contested confiscation hearing is held where the court ultimately determines the extent of the defendant's benefit from criminal offending and what level of assets the defendant has available. These may be conducted on the papers and on legal submissions only, or alternatively may require evidence to be heard and tested under cross-examination. As part of the sentencing process, a confiscation hearing is conducted entirely before a judge alone and the strict rules of evidence do not apply.

Concepts under POCA

The confiscation order will ultimately look to certify:

- The value of any financial gain (including costs avoided) accruing to the defendant from the particular charge(s) – known as 'benefit from particular conduct';
- In appropriate circumstances, any financial gain which is assumed to accrue to the defendant over the six years preceding the laying of the current charge(s) – known as 'benefit from general criminal lifestyle'; *and*
- The value of the defendant's available assets – known as 'the available amount'.

A defendant cannot be ordered to pay more than the available amount. If their benefit exceeds the available amount, defendants will be ordered to pay the available amount. The defendant remains liable to pay the 'balance' (the difference between the available amount and the benefit figure) until the value of the criminal benefit is paid. The source of any monies forming the available amount is irrelevant.

A simple example – Mrs Jones is made the subject of a confiscation order for breaching an enforcement notice. Her benefit is certified as being £150,000 but she has assets worth only £30,000. She will be ordered to pay £30,000 within three months[15] and the 'balance' of the benefit unpaid is £120,000. Two years later Mrs Jones receives an inheritance of £20,000. The prosecution can revisit confiscation and seek payment of the £20,000 towards the remaining 'benefit balance' of £120,000, leaving £100,000. Three years after that, Mrs Jones wins £110,000 on the lottery. The prosecution can apply for £100,000 of the £110,000 to be paid as the remaining balance of the confiscation 'benefit'. Mrs Jones gets to keep £10,000 of her lottery win.

Accordingly, if you encounter a defendant who was made the subject of a confiscation order but who was not ordered to pay the full 'benefit' amount, and later they appear to have valuable assets available to them, you should consult with your prosecuting legal team about revisiting payment figures for that defendant.

[15] And the authority, if it is investigator and prosecutor, will keep £11,250 (being 37.5% of £30,000)

The value of a defendant's interest in property is not necessarily 100% - if property is genuinely jointly owned with another then only the defendant's share falls to be included within the 'available amount'. Likewise the courts are concerned with a defendant's actual interest in property, not necessarily the 'legal' owner. A car registered in someone else's name but operated and controlled entirely by the defendant falls to potentially be included in any order against the defendant. Defendants cannot automatically 'sidestep' the effect of confiscation by having property held in the name of another.

Confiscation orders are fundamentally calculated on the basis of the value of property obtained by a defendant, not property retained. Think gross receipts, not profit. The costs of doing business are not deductible from confiscation orders. But orders are intended to apply to those who genuinely obtain monies (meaning exercising some meaningful control). This may require careful consideration of the facts of a case. It will certainly require careful consideration of the facts of any basis of plea offered to the prosecution if confiscation proceedings are contemplated, to ensure that bases of plea do not artificially curtail the prosecution at the stage of confiscation.

Restraint Orders

If there is a genuine risk that a defendant's assets may be dissipated before the stage of confiscation, the prosecution can seek to 'freeze' them under restraint orders, preventing disposal of the asset(s) concerned so as to make them available for any future confiscation proceedings. Any form of asset may be frozen, but are typically bank accounts, shares etc, or property (whether land or other valuable chattels such as vehicles, jewellery, art, antiques, plant, or machinery).

Restraint orders are specialist proceedings ordinarily pursued by financial investigators in conjunction with prosecution legal teams. If you have identified valuable assets in the hands of defendants and have genuine reason to believe that the asset(s) will dissipate before confiscation proceedings, you should flag this to your prosecution legal team immediately.

Improper restraint of property can have financial ramifications (in costs and damages) for a prosecuting authority. Restraint orders, although obtained in criminal proceedings, are civil in nature and financial liability for improper restraint will follow. Restraint proceedings should not be undertaken lightly.

Non-Payment

If a defendant fails to pay their confiscation order then they are at risk of being sent to prison for a period set by court at the point of making the confiscation order. Imprisonment for non-payment does not expunge the liability to pay – following release from prison, the defendant is still required to pay the sums ordered.

It is also open to the prosecutor to apply to the Crown Court to appoint an 'enforcement receiver' who can be empowered to seize the defendant's property and deal with it as directed – typically selling it and using the proceeds of sale to discharge the confiscation order (and the fees of the enforcement receiver). Any balance remaining after these are paid is returned to the defendant.

Variation

If information comes to light after the prosecution is finished which shows that either the 'benefit' figure or the 'available amount' was too small, the prosecution may latterly apply to the court to increase the benefit figure or the available amount. Evidence will be needed to substantiate such an application. If you encounter defendants who you know to be subject to confiscation and who appear to have assets beyond those declared previously in criminal proceedings involving confiscation, you should consult your prosecuting legal team.

7.4 Direct action (Tom Wicks)

LPAs have the power to enter land and take the steps required by notices issued under the provisions of the Act where those requirements have not been complied with in the time specified by the notice. These powers are found in Section 178 (enforcement notices), Section 219 (untidy land notices), and Section 225/A (advert removal notices) and can be exercised 'in-house' or by employing a specialist contractor.[16]

These powers are often the most efficient and effective way to remedy breaches of planning control or untidy land as an alternative to legal processes such as prosecutions or injunctions. It is often seen as a last resort but there is no reason why LPAs must exhaust other options first.

There is no requirement that the LPA give the owner or occupier notice before taking such action, or obtain warrants or injunctions[17]; indeed there is no power to obtain a warrant under Section 178 etc. The LPA is not required to take *all* the steps required by the notice[18] and may take other steps reasonably necessary to secure compliance with it (Section 111(1) Local Government Act 1972)[19]. Any person who obstructs the LPA in the exercise of these powers would be guilty of an offence (Section 178(6); noting that there is no equivalent provision in relation to Section 215 notices).

The LPA may recover any reasonably incurred expense in exercising its direct action

[16] R. (on the application of Blow Up Media UK Ltd) v Lambeth LBC [2008] EWHC 1912 (Admin)
[17] R. (on the application of Usher) v Forest Heath DC [2017] EWHC 2511 (Admin)
[18] Arcam Demolition & Construction Co Ltd v Worcestershire CC [1964] 2 All ER 286
[19] Egan v Basildon DC [2011] EWHC 2416 (QB), 2011 WL 4085031

powers (Section 178(1)(b)) and until such time as they are recovered they shall become a charge on the land[20]. Furthermore, the LPA may sell any materials removed whilst executing the works and off-set the proceeds against the cost[21].

Direct action powers are an efficient, effective and highly visible tool that can demonstrate to long suffering neighbours of unlawful development, adverts and untidy land, that the LPA is about more than just issuing new pieces of paper. These powers give the planning process the legitimacy and credibility it may sometimes appear to lack.

7.5 Injunctions (Amanda Bancroft, Barrister, BCP Council)

A useful tool in the armoury of any enforcement officer seeking to restrain actual or perceived breaches of planning control is the injunction. The power to seek and grant an injunction is to be found at Section 187B of the Town and Country Planning Act 1990, which states as follows:

> ***(1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.***

An injunction may be applied for in respect of persons known (in which case they would be named in the application as defendants) or persons unknown. Many of the cases relating to injunctions against persons unknown relate to those within the traveller community, but not exclusively (an example being where it is difficult to establish which of a number of legal persons has control of the land).

The application may be issued in the High Court or county court, using the Part 8 procedure, which will require a witness statement setting out the basis of the application, including the grounds for the injunction.

An injunction may be prohibitory or mandatory – that is, it may prohibit a defendant from certain actions or it may order the defendant to do a certain thing.

Grounds for an injunction

It is a pre-requisite for seeking an injunction that the LPA considers it “necessary or expedient” to restrain any actual or apprehended breach of planning controls.

[20] Regulation 14(2) of the Town and Country Planning General Regulations 1992
[21] s276 Public Health Act 1936

'Necessary or expedient' has its ordinary English meaning in this context – is an injunction required to prevent what is happening or force certain actions? Although the Act makes clear in subsection (1) that an injunction may be granted whether or not the LPA has exercised or is proposing to exercise any of its other powers, it is worth including a short section in the witness statement as to why an injunction is being sought rather than using any other power under Part IV of the Town and Country Planning Act 1990.

"Actual or apprehended breach of planning control": the application and evidence in support must set out either an actual breach of planning control or an apprehended breach. Evidence should set out clearly what the breach or anticipated breach is, how that contravenes planning control, and what the effects of *not* having an injunction are likely to be.

Interim injunctions and injunctions without notice to the defendants

Some circumstances necessitate an application for an interim injunction, which effectively the LPA is asking the court to grant assistance on a temporary basis before all the evidence is before it. The application can be made without informing the defendants that the LPA is making the application (a 'without notice' application); in which case, the Authority's statement must clearly state, in a stand-alone section, why application is being made without notice. Alternatively, the application can be made with notice to the defendants (which must be at least 3 days).

The test for an *interim* injunction (with or without notice) is fourfold:

- Is there a serious issue to be tried?;
- Would damages be an adequate remedy?;
- Where does the balance of convenience lie?; and
- Any other special factors?

The witness statement should deal with each of these. To take each in turn:

- The evidence must show that there is real substance to the application. The best way of demonstrating that is setting out clearly the breach or anticipated breach and the effect of that on the land and surrounding land;
- It may well be that the defendant does not have money or anything that damages could be enforced against; if so, this should be included in the statement. However, the statement should also demonstrate why damages would not compensate for the harm, if that is the case. For instance, it can be extremely difficult to put right damage to land once it has taken place;

- 'The balance of convenience' – the court has to weigh up the inconvenience and potential loss to each side. For instance, the court has to balance the inconvenience to the defendant of being prevented from exercising ownership rights for a short period against the potential damage to the land; and
- 'Any other special factors' – these will vary on a case-by-case basis. Factors can be special to the LPA (e.g. previous expensive enforcement action) or to the defendant (e.g. welfare needs).

In many cases, the interim injunction is granted until further order and is enough to cause the defendant(s) to cease the harm, in which case the LPA needs to consider what to do with the claim for permanent injunction. However, it is rare for an interim injunction to require defendants to take positive action and, if that is sought, a permanent injunction may still be required.

Permanent Injunctions

There is a simple test for a permanent injunction, and that is whether in all the circumstances, it is just and proportionate for the court to grant the order. There are, however, a number of factors, which the court will consider,[22] and officers should read the Porter decision carefully and cover these in their witness statement. The court must be clear that it would be willing to commit the defendant to jail for breach of the injunction. That involves balancing the hardship to the defendant with the need to uphold the integrity of the system. The history, the degree and flagrancy of the breach, questions of urgency and degree of damage to the land will all be relevant. The interests of children will be a primary consideration (but not an overriding one).

Service of the injunction order

Service of the injunction is vital to not only make the defendants aware of the order, but also for the purposes of enforcement of the injunction, should it be necessary. Because a breach of the order may be punished by way of imprisonment or fine, there are strict rules around service, which must be proved when making an application to enforce against any breach.

Where the defendants are known, the LPA must personally serve them with a copy of the order as soon as is possible after it is granted and the order sealed by the court. Should breach of the injunction have to be enforced, the court will want to know who served the defendant(s), where, when and how. It is worthwhile therefore preparing a certificate of service so it is to hand (and is contemporaneous) should it be required.

[22] South Bucks DC v. Porter (No.1) [2003] 2 AC 558

Where the defendants are unknown, the court is likely to make an order for alternate methods of service. These can take many various forms. A common form when the injunction relates to land is to place copies of the injunction in weatherproof pockets attached to stakes in the ground. When serving this way, it is a useful exercise to take photographs and mark a plan of the area with the stakes, and annex those to a statement of service, to prove that the LPA has taken all steps necessary to make the defendants aware of the order. Officers may need to return to the land frequently over the subsequent days and repeat the exercise, should they be removed; taking photographs both of the removal and the replacement orders.

When an injunction is breached

Injunctions are enforced by way of an application for an order for committal for contempt of court, provided that the original injunction had a penal notice on the face of the order. Should the court find the breach proved, it may fine or imprison the defendant. Where applications for enforcement of an injunction fail, it is usually due to either imprecise drafting of the original order or a lack of evidence of service of the original order. Officers should ensure that the actual terms are as precise as possible and make clear what is to happen, and also that the penal notice is included.

Section 8: Other

8.1 Enforcement against Unauthorised Gypsy and Traveller Encampments (Craig Allison)

LPAs (and the police) have strong powers to deal with unauthorised encampments. However, before taking any form of enforcement action, planning enforcement officers must consider the following:

- The harm such development can cause to local amenities and the local environment;
- The potential interference with the peaceful enjoyment of neighbouring properties;
- The need to maintain public order and safety and protect health;
- Any harm to good community relations;
- The needs of the occupants of the site; and
- That the LPA may enforce laws to control the use of an individual's property where that is in accordance with the general public interest

Before taking any form of formal enforcement action, it is imperative that the LPA establishes as many facts as possible surrounding the situation. Firstly, the Authority should visit the site, speak to the current occupiers of the land and establish if they are the land owners and how long they intend to occupy the site. If it is only the intention to stay on the site for a couple of days, then more appropriate measures should be put in place such as providing bin bags, temporary toilet facilities etc.

However, if there is evidence that the occupiers of the site are intending to either make the site a permanent encampment and/or do not have permission from the land owner to be on the land, there are a range of powers available to local authorities and the police which are explored in further detail below.

Temporary Stop Notice

A temporary stop notice can be served under Section 171E of the Town and Country Planning Act 1990, which can be used to stop all activity that breaches planning control for a period of 56 days. This will allow LPAS time to decide whether further enforcement action, such as an enforcement notice, should be served on anybody who has an interest in the land.

Possession Orders

A possession order under Part 55 of the Civil Procedure Rules can be obtained by local authorities who require the removal of trespassers from property, including land. These possession orders can be obtained by landowners and it is a duty of the local authority to advise landowners about their rights to recover land from trespassers through the Courts. A possession order may be secured quickly against trespassers (a minimum of 2 days' notice before a hearing can take place if the property is non-residential, or 5 days for a residential property). However, these are not supported by criminal sanctions.

Power of Local Authority to direct unauthorised campers to leave land

When people are residing in vehicles (including caravans) on land, Section 77 of the Criminal Justice and Public Order 1994 gives local authorities power to give direction for them to leave the land. This power applies only to land forming part of a highway, any other unoccupied land or occupied land on which people are residing without the consent of the landowner.

Enforcement Notice and Retrospective Planning Permission

The LPA may issue an enforcement notice under Section 172 of the Town and Country Planning Act 1990 requiring steps to be taken to remedy the breach of planning control within a given period. If an enforcement notice has been issued, the Authority may decline to determine a retrospective planning application for development that would grant planning permission for any of the matters specified in the enforcement notice.

Stop Notice

Section 183 of the Town and Country Planning Act 1990 enables a stop notice to be served to prevent any further development from occurring on the land; this must be accompanied with an enforcement notice to ensure the validity of the notice.

Power of the Police to direct unauthorised campers to leave land

It is worth noting that there are various police powers available to deal with unauthorised encampments.

Should trespassers refuse to adhere to a request to leave the land, Sections 61-62 of the Criminal Justice and Public Order Act 1994 gives police discretionary powers to direct trespassers to leave and remove any property or vehicles they have with them. This power applies where the senior police officer reasonably believes that two or more people are trespassing on land with the purpose of residing there, that the landowner has taken reasonable steps to ask them to leave, and any of the following:

- That any of the trespassers have caused damage to land or property
- That any of the trespassers have used threatening, abusive or insulting words or

behaviour towards the landowner

- That the trespassers have between them six or more vehicles on the land

Under this same legislation the Police can use Section 62 A-E to direct the trespassers to leave land and remove any vehicle and property from the land where there is a suitable pitch available on a caravan site elsewhere in the local authority area.

Another power available to LPAs is Injunctions. If a local site is particularly vulnerable and intelligence suggests it is going to be targeted for unauthorised camping (causing disruption to others going about their day-to-day lives) LPAs can apply to the courts for a pre-emptive injunction preventing unauthorised camping in a defined geographical area.

In all cases, the officers' first priority should be to speak to the unauthorised occupiers of the land to understand their intentions. Following speaking with the unauthorised occupiers, a land registry search should also be done to gather information in regard to the landowner and seek information from them of how the unauthorised development occurred. If the matter can be resolved informally then this is the preferred way to tackle the situation. However, if physical development occurs which is affecting the environment, formal enforcement action should be sought to remedy the situation by using any of the powers mentioned above if expedient to do so.

8.2 Ombudsman complaints (Roderick Morton, Ivy Legal)

The Local Government Ombudsman (LGO) investigates complaints of injustice caused by maladministration or service failure by councils.

Maladministration has a wide definition including delay, failure to take action, poor record keeping and poor communication.

The most typical complaint in relation to planning enforcement is that the LPA has failed to take enforcement action when the complainant thinks it should have.

Complainants are required to use both stages of the council's internal dispute resolution procedure before complaining to the LGO.

On receipt of a complaint, the LGO will conduct a short first stage review to determine if the complaint is within its jurisdiction and, if so, will proceed to investigate. Reasons for refusal include:

- The complainant has no personal interest or the issue is something that affects most people in the area.
- The issue is more than 12 months old

- The complainant had a right to appeal in another court or tribunal (whether or not the right was exercised).

LPAs are required by law to assist with an LGO investigation (Local Government Act 1974).

After investigation, the LGO will make its decision. The decision is usually published and is available on the LGO's website. Comparative statistics are collected on the number and result of complaints. The LGO writes annually (and publicly) to council CEOs about their complaints performance.

The LGO may direct a council to make a determination, to improve its procedures or to improve its communication. The LGO may award an amount of compensation in respect of particularly serious maladministration. This is usually a limited amount. No costs are awarded.

Investigation of planning breaches is usually considered a duty for LPAs. However, taking planning enforcement action is a discretionary power. The LGO has no power to interfere in a discretionary decision properly reached. It has no power to determine planning merits. The LGO is therefore likely to look primarily at:

- The manner in which the investigation was approached, whether it was timely and adequate and well communicated.
- The factors which went into the decision to take (or not to take) action, whether these were correct and complete.
- The communication of the decision

It can be difficult to separate the way in which a decision was reached from the decision itself, and LGO investigations can sometimes stray beyond the procedural points with investigators taking positions on merits. LPAs have a chance to comment on decisions before they are published, but cannot appeal an LGO decision.

8.3 Legislation, regulations, policy, advice notes & useful documents (Neill Whittaker, Ivy Legal)

Legislation

Although this list is far from exhaustive, all enforcement work has to be undertaken within the framework provided by the following legislation:

- Town and Country Planning Act 1990, subsequent and secondary legislation including The Town and Country Planning General Permitted Development Orders, Use Classes Orders, Development Management Order and Advertisement

Regulations

- Planning (Listed Buildings and Conservation Areas) Act 1990
- Planning (Hazardous Substances) Act 1990
- Planning and Compensation Act 1991
- Planning and Compulsory Purchase Act 2004
- Localism Act 2011
- Infrastructure Act 2015
- Planning Act 2008
- Equality Act 2010, section 149
- Human Rights Act 1998
- Planning & Energy Act 2008
- Local Government Act 1972
- Local Government (Miscellaneous Provisions) Act 1976
- Anti-Social Behaviour Act 2003
- Caravan Sites & Control of Development Act 1960
- Clean Neighbourhoods & Environment Act 2005
- Countryside & Rights of Way Act 2000
- Environment Act 1995
- Environmental Protection Act 1990
- Police & Criminal Evidence Act 1984
- Enterprise and Regulatory Reform Act 2013
- Growth and Infrastructure Act 2013
- Housing Act 2004
- Pollution Prevention and Control Act 1999
- Hedgerow Regulations 1997
- Levelling up and Regeneration Act 2023

Useful publications

There are numerous books, guidance and publications about planning, and some that will prove of value are listed below. The list is not exhaustive and these are in no particular order.

- National Planning Policy Framework
- Planning Practice Guidance
- Planning Practice Guidance/ Enforcement and post-permission matters
- Enforcement of planning law
- Town and Country Planning Act 1990 Section 215: best practice guidance
- Use of planning conditions
- Planning policy for traveller sites
- Dealing with illegal and unauthorised encampments
- Unauthorised encampments: using enforcement powers
- The Encyclopaedia of Planning Law and Practice is a comprehensive source of information and guidance on planning law and policy.
- Planning Appeal Decisions
- Journal of Planning and Environment Law see
- Planning Law and Procedures (14th edition published March 2009 by OUP)
- Telling & Duxbury ISBN 0199553203
- Planning Controls and their Enforcement, 8th Edition due for publication August 2009
- Development Control Practice (Subscription service: https://www.planningresource.co.uk/dcp)

Appeals:

- Town and Country Planning (Determination by Inspectors) (England) Rules 2002
- Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002
- Town and Country Planning (Enforcement) (Hearings Procedure) (England) Rules 2002
- Town and Country Planning (Enforcement) (Inquiries Procedure) (England) Rules

2002

- Enforcement appeals: procedural guide
- Enforcement appeals: appeal information sheet for LPAs
- Appeal Finder (subscription service https://appealfinder.co.uk)
- Compass (subscription service https://www.planningresource.co.uk/compass)

Ombudsman

Enforcement Officers should also be familiar with the Ombudsman fact sheet, which is aimed primarily at people who believe the council, should be taking enforcement action against a nearby development.

For more information about NAPE please visit the its page on the RTPI's website.

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