

Scottish Government Consultation Paper: Planning Enforcement Regulations 2007

Planning Committee
28 February 2008

1 Purpose of report

- 1.1 To inform Committee of the Scottish Government's latest consultation in its implementation of the Planning etc. (Scotland) Act 2006 and to recommend a response to the Consultation Paper on the Planning Enforcement Regulations 2007.

2 Summary

- 2.1 The Consultation Paper seeks views on the proposed enforcement regulations in relation to the level of penalty in respect to Fixed Penalty Notices; the form and content of Notices of Initiation and Completion of Development; On-site Notices; and activities that may not be prohibited by a Temporary Stop Notice.
- 2.2 While proposals are in general supported, the level of fines associated with Fixed Penalty notices are considered to be too low to act as an effective deterrent. There are further comments on the remainder of the Draft Regulations, including the prescribed classes of development subject to the new notification procedures.

3 Main report

Background

- 3.1 Existing planning enforcement powers are contained in Part VI of the Town and Country Planning (Scotland) Act 1997. The Planning etc (Scotland) Act 2006 received Royal Assent on 20 December 2006. The 2006 Act introduced a number of new powers and changes to existing powers contained in the Town and Country Planning (Scotland) Act 1997 as follows:

- Fixed Penalty Notices for Enforcement Notices;
- Fixed Penalty Notices for Breach of Condition Notices;

- Notices requiring application for retrospective planning permission for development already carried out;
- Temporary Stop Notices;
- Notification of Initiation of Development and Completion of Development;
- On-site Notices
- Enforcement Charters; and
- Removal of certain grounds for appeal against Enforcement Notices.

3.2 Secondary legislation is required in order to implement the changes contained in the 2006 Act. This consultation paper was issued in October 2007 and written responses are invited by 20 February 2008. The main details contained in the regulations are as follows:

Fixed Penalty Notices

3.3 Proposals involve the introduction of fixed penalty notices as a speedy alternative to prosecution for failure to comply with enforcement notices and breach of condition notices. The maximum fines on conviction are up to £20,000 in respect of a failure to comply with an Enforcement Notice and up to £1,000 for failing to comply with a Breach of Condition Notice. The Government believes that fixed penalty notices will have a "significant deterrent effect" in that it will be easier for planning authorities to take action which will be cheaper and more efficient than prosecution. The longer the offence remains uncorrected, the higher the potential financial penalty. For enforcement notices, the scale starts at £1,000, rising incrementally by £500 to a maximum amount of £5,000 (7 steps). For breach of condition notices, levels would start at £100, rising incrementally by £50 to a maximum of £300 (5 steps). The maximums proposed are in keeping with established legal precedents in respect of fixed penalty notices where the maximum does not exceed 30% of the maximum that can be imposed on summary conviction in court.

Notification on Initiation of Development, Notice of Completion of Development and On Site Notices

- 3.4 Anyone intending to carry out development for which permission has been granted within the prescribed categories (national, major or bad neighbour development) will be required to inform the planning authority before starting development of the date on which they intend to start (Notice of Initiation of Development NID). During development, for prescribed classes of development, a developer must display a notice from the date development starts for the duration of development until it is completed (On-site Notices). Once development has been completed, a completion notice must be supplied to the planning authority (Notice of Completion of Development or NCD). Failure to comply with these requirements becomes a breach of planning control.
- 3.5 NIDs are seen as a tool to enable intervention at an earlier stage where for the first time, developers will be required to notify planning authorities of their intention to start development. This should assist planning authorities in identifying active developments to focus resources more effectively, particularly

given the proposed three year period for implementation from the express grant of planning permission. In addition to a developer's name and address, information is to include their enforcement history over the previous three years from the date of planning permission having been granted and extending up to the date the NID was submitted. The developer would not need to record any enforcement action which was the subject of an appeal or had been withdrawn. The purpose of On-Site Notices are to raise public awareness of development taking place in their area.

Temporary Stop Notices

- 3.6 The 2006 Act provides powers to issue temporary Stop Notices (TSNs) similar to provisions already in place in England and Wales. Current powers allow the service of a Stop Notice in conjunction with an Enforcement Notice with the Stop Notice usually taking effect after three days, unless there are special circumstances which are justified. Temporary Stop Notices would take effect immediately and be valid for up to 28 days and are envisaged as a tool to speed up and simplify procedures for stopping unauthorised development. The service of a Temporary Stop Notice does not affect the exercise of a planning authority's administrative discretion to serve a Stop Notice in conjunction with an Enforcement Notice at the expiry of the 28 day period. It is entirely legitimate to take no further action. Like Stop Notices there is no right of appeal but more importantly Temporary Stop Notices do not have to be served in conjunction with an Enforcement Notice, which can be appealed. In addition, Temporary Stop Notices do not need to be served on individuals and only require to be displayed.
- 3.7 Few restrictions on their use are proposed. The exceptions are use of a building as a dwellinghouse and the removal from site of a caravan occupied by a person as their main residence. This is subject to the proviso that the caravan does not cause a danger to either the occupants or the public in general or would be unacceptable for some other compelling planning reason.

Response to Consultation

- 3.8 A detailed response to the questionnaire accompanying this consultation is contained in Appendix 1. This has been sent to the Scottish Government as a draft response in order to meet the consultation deadline of 20 February. While the proposals are broadly welcomed, there are significant reservations over the levels of fines associated with FPNs in terms of their deterrent value and therefore their use by planning authorities. The need to focus proactive enforcement on "significant" development is supported but the prescribed categories are inflexible and do not allow individual authorities to exercise any administrative discretion on a statutory basis in relation to other developments which may be sensitive. Planning permissions subject to conditions precedent (i.e. conditions requiring steps or works to be undertaken before development commences) must form part of the prescribed classes, given the potential implications on lawfulness where such conditions are not purified. Clarification on rights of appeal against subsequent Enforcement Notices relating to the

same breach of planning control needs to be given, as does the determination of appeals arising out of enforcement action.

4 Financial Implications

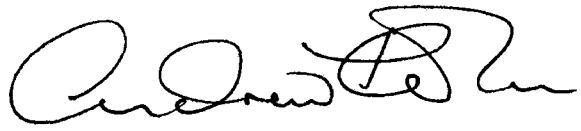
- 4.1 The revised enforcement powers place emphasis on taking effective action quickly and lie at the heart of planning reforms designed to restore public confidence in the planning system. In order to meet these aspirations, a review of delegated powers for enforcement activity is required. This and its financial implications will be the subject of a further report to committee.
- 4.2 A further impact of the reforms relates to ICT and operating systems. While future changes to the Uniform operating system may take account of changes through the introduction of new versions of software, it is anticipated that existing systems will need to incorporate the changes, some of which are unique to Scotland. This will involve changes to the Development Control, Enforcement and Conditions Monitoring Modules. This would relate to the re-design of templates for inclusion with decision letters for prescribed categories of application, a new standard condition and new types of notices once regulations have been finalised. Existing functionality with scanning of documentation on IDOX can be achieved. The implications will be clarified once the regulations are finalised.

5 Conclusions

- 5.1 The proposals as set out in the Draft Regulations represent the first stage in introducing powers to deliver a planning enforcement service consistent with the Scottish Government's modernisation of the planning system. While there are some concerns with the detail of the consultation, the greatest challenge facing the Council is implementing the changes. This will require particular emphasis on the change of culture in relation to enforcement, to ensure that enforcement action is swift and effective. Following publication of final procedures by the Scottish Government, a further report will be made to committee on appropriate operational procedures, including revised delegated powers.

6 Recommendations

- 6.1 It is recommended that the Committee agrees that this report and the Appendix be forwarded to the Scottish Government as the Council's formal response to the consultation paper on Enforcement.



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Appendix I

Detailed considerations by The City of Edinburgh Council on the Scottish Government, Consultation Paper "Planning Enforcement Regulations 2007" October 2007

1. Do you support the proposal that penalties should be increased for continuing breaches and if not, why not?

CEC Comment

Yes, this is the simplest and fairest method for dealing with an increased scale of penalties. Any other proposals, e.g. link to significance of breach, would be difficult to implement and would require further primary legislation.

2. Do you have any views on the proposed amounts for the fixed penalty, in particular the proposed initial amounts?

CEC Comment

The proposed initial amounts are too low and are unlikely to act as a deterrent to those guilty of an offence of not complying with an enforcement notice or a breach of condition notice. They are unlikely to inspire public confidence and may be viewed as a soft option, notwithstanding inherent risks/time/costs associated with pursuing prosecution. In addition, the low level of fine may also result in reluctance by some planning authorities to utilise the provisions (particularly those authorities which have well established mechanisms for taking direct action as the use of default powers will be seen to represent the only real satisfactory outcome i.e. remedy).

3. Do you have any views on the proposed increase in the amount of each subsequent fixed penalty, in particular with regard to the number of FPNs that would be required to reach the maximum and whether the fixed penalty should increase by a larger amount for each subsequent offence?

CEC Comment

There are too many increments, seven and five respectively in the case of Enforcement Notice and Breach of Condition Notices, particularly where each Fixed Penalty Notice is to be the subject of a fresh Enforcement Notice/Breach of Condition Notice. The need to serve such notices on "affected parties" can be onerous, particularly in tenemental areas where there is multiple land ownership/occupation. It remains unclear as to the position regarding the ability to appeal subsequent Enforcement Notices. On the basis of the proposed maximum fine levels, it is submitted that increments of £1,000 for Enforcement Notices and £100 for Breach of Condition Notices would be more appropriate.

4. Do you have any views on the proposed level of information requested in the NID or any suggestions for other information, for example declaring that any suspensive conditions had been met, might be useful?

CEC Comment

The level of information is excessive and it should be left to individual planning authorities to couch their own warnings about purification of conditions precedent.

The requirement for details of any recent planning enforcement action is superfluous. Local planning authorities are already aware of those developers against whom enforcement resources need to be targeted. In addition, there is no national register of enforcement notices and therefore it will prove difficult to check or prove whether the information is correct. There is also the issue of enforcement record for developers, where current applications are made by a combination or consortium. This devalues its inclusion and has similarities to difficulties the police have in relation to "foreign offences" under other regulatory regimes. The information being requested would be of greater value to the local community if it formed part of the On-Site Notice.

5. Are you content with the proposed time limits for recording relevant enforcement action?

CEC Comment

It is submitted that where this information is to be required then a longer period should be specified. A period of three years is short when compared to the amount of time other convictions require to be declared.

6. Bearing in mind that the purpose of the notice is to make people aware of the development and direct them to the appropriate contacts for further information, are you content with the level of information to be included?

CEC Comment

The section covering further information should also direct individuals to the Council's website (i.e. for viewing the planning application). In addition, contact details for the developer and/or site agent should be given.

7. Are you content with the proposed categories of development for which notices would be required to be displayed, and if not, why not?

CEC Comment

In general terms, the idea of focussing proactive enforcement on major types of development is logical and is consistent with this Council's current practice. However, it would be beneficial to also give planning authorities an additional administrative discretion to monitor other developments which may not fall within the defined categories, but relate to "sensitive" developments or ones by developers whose track record requires assistance from enforcement. At the very least, all planning permissions subject to conditions precedent should be included in the prescribed categories given the implications on lawfulness of any subsequent development where such conditions are not purified.

8. Do you consider this sufficient, or would you like to suggest other criteria for the siting, display, size, etc, of these notices.

CEC Comment

A3 would be an appropriate size. There will clearly be situations where such notices are removed and local planning authorities should not act as arbiter in such disputes between developers and third parties. It is recommended that as part of the Notice of Initiation of Development, there is a section where the applicant provides a copy of the On-Site Notice with written confirmation that it has been displayed, similar to

provisions relating to site notices for licence applications under the Civic Government (Scotland) Act 1982. As best practice, copies of these notices should be placed on the Council's Website for public viewing.

9. Are you content with the proposed draft Regulations and if not, why not?

CEC Comment

Yes.

10. Are there any other situations where you believe use of a Temporary Stop Notice should not be permitted?

CEC Comment

No, the whole benefit of these notices is the limited circumstances in which they are prohibited. It is questioned whether planning is the appropriate regime to deal with public safety issues.

General comments on consultation

11. Do you wish to comment generally on the draft Regulations, RIA, EqIA, or other issues in respect of this consultation?

CEC Comment

It is assumed that the introduction of TSNs has been considered against the Human Rights Act. Clarity on the appeal rights in relation to subsequent Enforcement Notices relating to a continuing breach of planning control is sought as is clarity on the role of determination of appeals. Will all enforcement appeals be subject to review by the Scottish Ministers or will certain matters be reviewed locally?