

## Retrospective Planning Permission Enforcement

### RECOMMENDATION

1. To consider the information provided and interview the officers.

### SUPPORTING INFORMATION

- 2.1 When the new Commission's Work Programme was finalised in September 2010 one decision was that a scheduled meeting should receive a presentation on enforcement action against unauthorised developments and the frequency of retrospective planning applications.
- 2.2 At the request of the Chair the item has been broadened to cover:
  - a) Action regarding unauthorised developments and the frequency of retrospective planning applications
  - b) The cutting down of trees by developers in breach of planning conditions
  - c) The conditions attached to planning permission: absence of time limits and / or lack of enforcement
- 2.3 Appendix Two is a briefing paper explaining the legal position and the approach taken.

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**Background papers:** Report to 20 September meeting

**List of appendices:** Appendix 1 – Implications  
Appendix 2 – Briefing

**IMPLICATIONS**

**Financial and Personnel**

1. The Budget set by Council on 2 March relates to the staffing resources available.

**Legal**

2. As set out in Appendix Two.

**Derby Plan and Council Plan Priorities**

- 3 This relates to: 'a better built and natural environment'.

<b>Health and Safety</b>	)	
<b>Environmental Sustainability</b>	)	Not known, possible areas for discussion
<b>Asset Management</b>	)	
<b>Risk Management</b>	)	

## RETROSPECTIVE PLANNING PERMISSION ENFORCEMENT - BRIEFING

The briefing seeks to identify and separate the specific questions.

### Enforcement Powers

Perhaps the initial point I need to make is that the sole purpose of enforcement is **to prevent unacceptable** development. It is important to appreciate that not all unauthorised development will be unacceptable. We can't 'legitimately' take action against unauthorised development that would be acceptable in planning terms unless it gives rise to consequences that require controlling by condition. Government guidance is given concerning this in **Planning Policy Guidance PPG18** People tend to think it is about forcing people to obtain permission, **it is not. It is** about preventing unacceptable development / consequences from development. The failure to get permission has its own direct consequences on the owner in terms of value of the property, ability to sell and use it as a security.

#### 1. How is Derby using its enforcement powers?

We use powers:

- Where the effect of contravention results in unacceptable development
- When it is a contravention that can't be resolved by negotiation
- Action is proportionate having regard to human rights and potential cost consequences to the Council

#### 2. How often is there a need?

I have produced some figures below as a comparison but to put this in context. At present between myself and my assistant Mark Johnson [subject to proposed change] we deal on average with 500 complaints a year that require resolution through investigations, planning history checks, land registry checks, site visits, [often several] meetings, photos, and letters. We carry out site visits every day. We also when possible carry out projects, recently these included:-

- Unauthorised car parks within the City Centre. Of the 15 in total 7 were closed down the others were given approval following applications or had established uses.
- Smoking shelters at licensed premises, in conjunction with Environmental health we investigated 10

The enforcement team's Administration assistant, who is office based, deals with the discharge of planning conditions on

conditional planning approvals which average 1500 to 2000 applications a year, each of which may have several conditions on the application. This results in an enormous number of transactions. The officer brings to our attention those that have not been discharged and may lead to Breach of Condition action if not resolved through negotiation.

In addition we deal with a vast number of casual callers at Roman House reception, telephone, letters and email enquires many of which can be resolved at that time but take up a considerable amount of time.

**3. What options are available – depends on the severity of the breach but essentially:**

Enforcement/ Breach of condition notice  
Stop Notice  
Injunctions

Oral explanation of what the differences are and the pros and cons and why enforcement is in most cases not going to be the initial appropriate route (costs major factor)

**Retrospective Planning Applications**

LPA's should bear in mind that it is not an offence to carry out development without first obtaining any planning permission required for it [Sec 73A of 1990 Act] if it is likely that unconditional planning permission would be granted for the development which has already taken place.

The correct approach is to suggest to the person responsible for the development that he should at once submit a retrospective planning permission. It benefits the owner because it regularises the property adding value, and makes it easier to sell and use as a security. Its benefit in planning terms is that in some cases it allows for greater control by attaching planning conditions.

The system **isn't** about penalising people for failing to make applications, its about ensuring development is acceptable and that has to be judged on the planning merits of the application rather than anything done or not done by interested parties.

**1. How frequently does it happen?**

I have checked our records over the last 5 years since 2005 we have received approximately 10,900 planning applications approximately 225 of those have been retrospective, which at 2% is a relatively small proportion.

## **2. How firm are we?**

This question and 3 below suggests a misunderstanding of what these applications are about. Hopefully the previous detail will have clarified the issue.

We would only invite an application if development was in principle acceptable, if development is unacceptable then we would not invite an application for planning permission, and would seek to remedy via the enforcement process.

## **3. What follow up conditions are available?**

If an Enforcement Notice is served it remains as a land charge on the property register and would be revealed to potential purchasers during the 'Search Process'.

Failure to comply with an Enforcement Notice may result in a prosecution and court fines.

## **4. Could better public information reduce cases of oversight?**

The Public have never been better informed concerning all aspects of planning matters and their control nearly all of which are in the public domain and because of this are only too willing to report any concerns they have about their neighbours or any other matters they feel are subject to planning control. Information is available in the following locations:

Internet; Planning Portal, Householders Guides to Planning Permission, Site Notices, Weekly Lists of Planning Applications, Involvement of local Councillors and Press Advertisements.

It may be useful if we carry out a survey over a period of time to determine why people failed to make an application and we will be discussing this further.

## **5. Could stricter enforcement deter deliberate flouting?**

Deliberate flouting of planning law is still relatively small scale. The majority of unauthorised development is carried out in ignorance of the regulations. [A builder told me "it was ok" syndrome]

Two Enforcement officers for a City the size of Derby is not sufficient if the uncovering of more unauthorised contraventions is required. There will always be individuals for what ever reasons that will seek to flout the regulations. At this point I should remind that simply because it is unauthorised doesn't mean development is unacceptable.

Over the last 10 years we have worked together with our Legal Division to resolve breaches of planning control without the need

to resort to formal action, therefore reducing significantly the need to serve Enforcement Notices whenever possible, and then only after every other avenue has been exhausted again following advice in **PPG18**

In the period from **2000 – 2005** **34** Enforcement Notices were served.

In the period from **2005 – 2010** **20** Enforcement Notices were served.

In addition we have carried out prosecutions in relation to unauthorised advertisements, unauthorised works to protected trees and issued formal cautions.

Legal Action is expensive to the Council, time consuming and does not always effectively remedy the situation to everyone's satisfaction. We operate a system of site visits, face to face meetings, correspondence, negotiations and advice which has worked extremely well and reduced the need to issue formal enforcement notices or take legal action in all but the most serious cases.

### **Trees in relation to construction sites**

T1. Incidences of works resulting in the damage or destruction of trees by developers or their employees that are conditioned for retention is relatively small in relation to the amount and scale of building and development sites.

T2. The majority of incidents that do occur appear to stem from inadequate or no protection being afforded to the trees at the start of or prior to construction work commencing, or the removal of such protection at some stage during the construction process for various reasons. This may result in a breach of a standard condition on the planning approval, when construction work is carried out in close proximity to trees.

T3. Investigations relating to unauthorised works to protected trees are extremely difficult and time consuming.

T4. In most cases a prosecution will not be brought if consent would have been granted for the works undertaken had it been applied for, or where the works have been carried out in accordance with good arboricultural practice or where it is considered the tree will recover its full health, form and amenity value over a short time scale.

T5. Nor will a prosecution normally be brought where any detriment to amenity could be put right within a short period of time by replacement planting.

T6. In considering whether to bring a prosecution regard will be had to the likelihood of the offence being repeated by the accused person or by someone else in similar circumstances. Regard will also be had to any financial advantage perceived to have been gained by carrying out the unauthorised works.

T7. Whilst ignorance of the law is not an excuse, the attitude and circumstances of the accused will be taken into account, including any expression of regret helpfulness and co-operation with the investigation and any indication that the accused was acting in good faith.

T8. Individual personal circumstances and any other mitigating factors will be taken into consideration where appropriate

T9. The present level of enforcement resources, two officers for the whole City with plans to delete one of the posts, means that the Arboricultural officers with their specialist knowledge must take a greater responsibility in any initial investigation by carrying out the initial site visits whenever possible, identifying the protected trees and their species taking photographs and gathering evidence. This should out of necessity involve officers from that section being given training concerning the Police and Criminal Evidence Act 1984.

T10. When an incident of damage to or removal of trees marked for retention on development sites is brought to our attention, it should be investigated - those responsible interviewed and the full circumstances leading to the damage or removal ascertained and then a decision will be made as to how we will deal with the matter based on the evidence available and having regard to our legal services advice. The options may be:

- Take no formal action
- Issue a formal caution
- Require remedial works to the tree
- Require Replanting / replacement
- Prosecution
- Or possibly a combination of the above depending on the case

## Planning Conditions

P1. The 1990 Planning Act gives the powers to impose conditions on planning permissions **only where** there is a clear land use planning justification for doing so. The general test of *vires* of conditions is

established in Circular 11/95 and each condition must meet at least one of the standard tests of:

- Need – a condition requiring the development to be completed in its entirety may fail the need test
- Relevancy to planning – must not be used to achieve the purposes of separate systems of control / legislation
- Relevancy to the development to be permitted – must be in connection with the development authorised by the permission
- Enforceability – infringement must be possible to detect
- Precision – and clear to ensure requirements are carried out and by when to enable compliance
- Reasonableness – must not restrict the use of the land such that it effectively nullifies the benefit of planning permission

P2. It is against this background conditions are drafted. The duration of a planning permission is defined by Government and is currently 3 years from the date of grant. Time limits can be imposed on planning permissions – often for activities such as Hot Food uses or car repair / washing businesses.

P3. A potential breach of such a condition often requires a complainant to maintain a written record to generate the necessary evidence to support any future action officers may take including formal action through the courts should that become necessary.

P4. Actual enforcement action through the courts is the last resort and most breaches of planning permission are resolved through mediation and negotiation. That said to resolve an alleged breach can take many months to gather sufficient evidence to satisfy our legal officers and ultimately present a robust case in court. In the meantime the activity may continue as it is not a criminal offence to breach planning legislation.

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